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IN THE

Supreme Court of the United States

STEPHEN C. HILBERT; the THOMAS C. HILBERT IRREVOCABLE TRUST; the THOMAS C. HILBERT IRREVOCABLE TRUST II; the STEPHEN C. HILBERT AND STEPHEN C. HILBERT AUGUST 1998 TRUST; the TODD S. HILBERT IRREVOCABLE TRUST; the CHRISTOPHER L. MYERS IRREVOCABLE TRUST; and the HEATHER DAWN HILBERT IRREVOCABLE TRUST,
PETITIONERS

v.

CONSECO SERVICES, L.L.C.,

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF INDIANA, SECOND DISTRICT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

There exists a split in the lower federal courts on two issues surrounding § 29(b) of the Securities and Exchange Act of 1934, and the split on both issues rests directly on language in this Court's decisions in Mills v. Electric Auto Lite, 396 U.S. 375 (1970) and Transamerica Mortgage v. Lewis, 444 U.S. 11 (1979). Does § 29(b), along with the present regulatory environment, permit a borrower to (1) defensively assert a violation of Regulation U and/or (2) provide a borrower with a private right of action?

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF INDIANA

Stephen C. Hilbert, et. al., respectfully prays that a Writ of Certiorari issue to review the judgment of the Court of Appeals of Indiana which affirmed the trial court's summary judgment and award of more than 62 million dollars.

OPINIONS BELOW

This action was commenced when Respondent Conseco Services filed a six-count complaint against Petitioners alleging breach of contract regarding various notes and letter agreements executed by Petitioners. The trial court granted Respondent's motion for partial summary judgment. In so doing, the court granted Respondent an *in rem* judgment against Petitioner Hilbert's personal residence; a personal judgment against Petitioner Trusts totaling over 62 million dollars, plus interest; a personal judgment against Petitioner Hilbert, as guarantor, in the same amount; and a decree of foreclosure for the above mentioned personal residence.

The opinion of the Indiana Court of Appeals, affirming the trial court's grant of summary judgment, is reported at Hilbert et. al. v. Conseco Services, LLC, 836 N.E.2d 1001 (Ind. Ct. App. 2005) [2a]. The Indiana Supreme Court denied transfer without opinion. Hilbert et. al. v. Conseco Services, LLC, 2006 Ind. LEXIS 232 (Ind. 3/16/2006) [1a].

JURISDICTION

The judgment sought to be reviewed is the affirmance of the trial court's grant of partial summary judgment over Petitioners' Regulation U defense. The Indiana Supreme Court denied rehearing, without opinion, on March 16, 2006. This Court's jurisdiction to review this case is invoked pursuant to 28 U.S.C. § 1257 and United States Supreme Court Rule 10, Petitioners having asserted below and asserting herein a deprivation of rights secured by statutes enacted and regulations promulgated under the authority of the United States. Justice Stevens, on behalf of the Court, extended the time to file this Petition, to and including July 14, 2006.

RELEVANT PROVISIONS PROVISIONS INVOLVED

(see appendix)

STATEMENT

On a $10,000 personal investment, Stephen Hilbert co-founded Conseco in 1979. The company flourished in spite of the fact that Mr. Hilbert has no law or business degrees and has completed only high school. By 1997, Conseco was the largest publicly traded life insurance company in America [STA 373].[1] It had a market capitalization of approximately 14 billion dollars and was listed on the Standard & Poor's 500 Index [STA 373].

By 1998, Conseco employed 17,000 people and had offices in 49 states. Its home offices were in Carmel,

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[1] The appendix to this Petition is cited as "[page number]a". Citation to the state court appendix is "STA [page number]".

Indiana, a suburb of Indianapolis. Central Indiana was a frequent beneficiary of Mr. Hilbert's generosity [50a]. In 1997, Mr. Hilbert placed 38th on Fortune magazine's list of top philanthropists [52a]. Shortly thereafter, "amid a torrent of gift giving", he and his wife were honored by the National Society of Fundraising Executives as outstanding philanthropists [50a].

Under Mr. Hilbert's stewardship as co-founder and CEO, shareholders were the beneficiaries of four stock splits ~ in 1991, 1992, 1996 and 1997. From a mark of $7 per share in 1985, Conseco stock was trading (split-adjusted) for approximately $112 per share by April 2000. In April 2000, Mr. Hilbert resigned as CEO [STA 452]. Approximately three years later, Conseco filed for Chapter 11 bankruptcy relief.

The instant litigation arises out of an employee stock purchase plan approved by the Conseco Board of Directors and implemented while Mr. Hilbert was CEO [57a]. Such plans were not unique. The idea was first proposed by Dennis Murray, a Board Member, who got the idea from an article he read in *Barron's* magazine about similar programs implemented at other companies [STA 477].

Barron's reported that company stock programs were a response to a shift that had taken place in the control of Corporate America in the 20th century, resulting in a new type of corporate manager [38a]. This new manager had virtually unfettered control of the corporation he managed but owned little or none of its common stock [38a]. The chief shortcoming of this management model identified by *Barron's* was the tendency of executives to not focus on how their companies were performing in the stock market [38a].

In July 1995, *Barron's* reported that the "latest proposal aimed at remedying this situation has been quietly sweeping through the ranks of the largest U.S. companies for several years now, and it has gathered force in recent months" [39a]. The general theme of the solution was to "[c]oerce top executives to hold huge amounts of company stock so that their personal fortunes are inextricably tied to those of shareholders" [39a]. Companies operating under such plans included Ford, American Express, Intel, BankAmerica, Bell Atlantic and J.P. Morgan [40a]. Stock purchase plans for lower level employees were likewise thought to be beneficial as they contributed to building an *esprit de corps* [39a].

Like corporations nationwide, Conseco was concerned about aligning management's interests with those of its shareholders. On March 12, 1996, the Board of Directors unanimously approved a program to provide directors, officers and employees the opportunity to purchase Conseco stock (the "1996 Program") [STA 373]. The goal of the 1996 Program, like programs nationwide, was to align the interests of directors, officers and employees with Conseco's shareholders by increasing their ownership of common stock. By creating an ownership interest, the Board hoped to increase motivation to profitably manage Conseco. An ownership interest would also encourage retention of directors, officers and employees. Thus, the 1996 Program and its anticipated benefits was very similar to those described in the *Barron's* article and employed by behemoth companies like American Express. On its face, the 1996 Program acknowledged the benefits to Conseco [57a].

Conseco negotiated with a syndicate of banks to provide financing to the Program Participants for the stock purchases [STA 392]. These were the same banks with whom Conseco did an enormous volume of unrelated loan business, including its major credit facilities [STA 374]. The Conseco-banks agreed to loan 100% of the value of the stock, primarily because Conseco guaranteed repayment to the banks of all principal, interest, prepayment fees and other obligations associated with the loans. Conseco agreed to direct its wholly owned subsidiary, Conseco Services [hereafter "Services"] to advance all interest payments it had guaranteed for the stock purchases [62a].

As for the actual purchase of stock within the 1996 Program, Conseco – in its sole discretion subject to the terms and provisions of the 1996 Program – dictated the timing, amount, price and mechanics of all stock purchases [59a]. The plan negotiated between Conseco and its banks required that the stock be held by the Conseco-banks as collateral [60a]. No other collateral was required [STA 375]. Initially, dividends on the stock were required to be used as a set off against Services's advanced interest payments; Program Participants were permitted to retain only those portions of dividends that exceeded interest advanced [61a].

Mr. Hilbert purchased Conseco stock in connection with the Program while he was employed there on behalf of separate Trusts established for the benefit of his children. Thereafter, for each of the years 1997, 1998 and 1999, a separate but similar program was approved for additional stock purchases (the "Additional Programs") [STA 399 (1997); 408 (1998); 418 (1999);1558]. Mr. Hilbert executed guarantees on his own behalf for certain of the loans and on behalf of the Trusts for others. These guarantees were on the loans made by the Conseco-banks to Program Participants finance 100% of the purchase price of the Conseco stock purchased under those Additional Programs (collectively with the loans for the 1996 Program Loans, the "Program Loans").

Mr. Hilbert left Conseco in April 2000 and entered into a termination agreement [STA 452]. Conseco explicitly agreed to continue to advance interest payments on the Program Loans as they came due [STA 453].

In November 2000, the interest notes between the borrowers of the Program Loans and Services were refinanced. The new notes (hereafter "Services Notes") superceded the previous notes [STA 94-116; e.g. 72a]. Mr. Hilbert personally guaranteed payment of the Services Notes.

Although the Services Notes were ostensibly for the purpose of repayment of interest Services had advanced on the Program Loans, their terms did not actually reduce interest indebtedness. Rather, the Services Notes dictated that payments made pursuant to them were transferred to the Banks for payment on the Program Loans (principal) until such time as that indebtedness was paid in full:

> [I]f Maker tenders to [Services] any payment of interest or principal (a"Payment") hereunder at a time when any of Maker's Program Loans are still outstanding then [Services] will deliver the amount of the Payment to the Banks to be applied to the Program Loans . . . . Payment will not reduce in any manner or serve as a credit against any of Maker's indebtedness to [Services] for principal or interest evidenced by this Note.

[see e.g. 74a; STA 95; STA 99; STA 103; STA 107; STA 111; STA 115].

The Services Notes had a maturity date of February 28, 2001. Around that time, Mr. Hilbert and Conseco were attempting to negotiate a number of disputes that had arisen between the two. Mr. Hilbert and Services continued to negotiate and on December 13, 2000, the parties entered into an agreement whereby they adopted a procedure to resolve all their differences. The goal for resolution was February 28, 2001, the same day the Services Notes matured.

On April 2, 2001, the parties entered into a letter agreement (the "April 2001 Agreement") pursuant to which: (1) Conseco agreed to forego immediate collection of the Services Notes, and to direct Services to advance interest, fees and other charges accrued or accruing on the Program Loans and Interest Loans through December 31, 2003; (2) Mr. Hilbert agreed to make three payments on behalf of his Trusts totalling $17 million dollars over the next two years, and he agreed to post collateral worth not less than $19.4 million; and (3) Services required that his home be posted as part of that collateral [68a et.seq.].

Although the April 2001 Agreement was struck between Mr. Hilbert and Services, again the payments were directed to be made not to Services, but to the Banks [68a]. Mr. Hilbert made the first two of these payments, totaling $7 million, but did not make the final one. The final payment became due after Conseco filed for Chapter 11 bankruptcy protection.

Summary judgment was granted in Conseco's favor on its claims of breach of the Services Notes, the guarantees and the April 2001 Agreement. A money judgment in excess of $62 million was entered against Mr. Hilbert and the Trusts and an order of foreclosure on the Hilberts' home was entered.

A. TRIAL COURT RATIONALE.

The trial court granted Conseco's motion for partial summary judgment. With regard to Petitioners' Regulation U defense, the court held the question was a matter of law properly resolved by the trial court on summary judgment.

First, the court concluded the Services Notes are not margin loans and are not secured by any margin stock [STA 55-56]. Thus, in the court's view, Regulation U was inapplicable. Second, the trial court said Petitioners had no standing to assert a Regulation U defense because borrowing investors do not have a private right of action [STA 56]. In response to Petitioners' assertion that it was not asserting a private right of action but rather offering a defense, the court concluded essentially that Petitioners were seeking a judgment in its favor so the distinction was without merit.

B. COURT OF APPEALS DECISION.

The Court of Appeals ruled in Conseco's favor. The Court of Appeals decision appears to be grounded on three factors. First, because there purportedly was no nexus between the Services Notes and the banks, § 29(b) of the Securities and Exchange Act was inapplicable [31a]. Second, the Court concluded a private party could not raise a claim of illegality on account of a violation of Regulation U ~ even defensively ~ under § 29(b) [32a]. Third, the court held that even if a private party could raise a violation of Regulation U defensively, Petitioners could not because Mr. Hilbert was the CEO and Chairman of the Board at the time Conseco obtained the loans [32a].

REASONS FOR GRANTING THE PETITION

In an era where the right to trial by jury is expanding and not contracting, e.g. Apprendi v. New Jersey, 530 U.S. 466 (2000), Petitioners were denied a trial on a 62 million dollar plus judgment. It is ironic that this case comes to the Court in this posture from a State that guarantees the right to trial by jury for speeding infractions. Cunningham v. State, 835 N.E.2d 1075 (Ind. Ct. App. 2005), trans. den. Having been denied a trial, absent the granting of this Writ, Petitioners will be left with their appellate claims having been finally decided upon by an intermediary state appellate court. That those claims involve the interpretation of complicated federal regulations that the Indiana state appellate courts have never previously confronted makes this predicament all the more vexing. Even worse, the decision of the Indiana courts on the issue presented here have been, and likely will continue to be, relied upon by other courts in related litigation including the litigation concerning the validity of the Program Loans.[2]

One critical provision involved in this Petition for Writ of Certiorari is section 29(b) of the Securities Exchange Act of 1934. That provision provides:

> Every contract made in violation of this chapter or any rule or regulation thereunder...shall be void (1) as regards the rights of any person who, in violation of such regulation, shall have made or

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[2] In litigation involving a different Program Participant, an Indiana trial court recently ordered summary judgment and awarded over $4 million. The court rejected the Defendants' Regulation U defense there because the trial court considered itself bound by the Indiana Court of Appeals decision in this case. Conseco v. Massey, Hamilton County Cause Number 29D01-0406-CC-477 (Order of 6/21/06). A separate action is pending in Cook County, Illinois concerning the Principal Loans. Hilbert v. Conseco, Circuit Court of Cook County Case Number 03 CH 15330. Over $155 million is at stake there. Conseco has routinely kept the Cook County Court informed of the status of this litigation.

> engaged in the performance of any such contract, and (2) as regards the rights of any person who, not being a party... shall have acquired any right thereunder... with actual knowledge of the facts by reason of which... such contract was in violation...

Section 29(b) applies to all sections of the Securities and Exchange Act of 1934. The significance of this provision increases as the number of Americans participating in the stock market surges.[3]

The landmark cases decided by this Court regarding § 29(b) are approximately three decades old. During this Court's silence, a large divide in the decisions of the lower courts has resulted. This Court should grant the Writ of Certiorari to remedy the broad based confusion as to the reach of § 29(b), especially in light of the present regulatory environment governing violations of Regulation U ~ which have been misunderstood and misapplied by the Indiana Court of Appeals.

In Part A, Petitioners discuss the precedent from this Court concerning § 29(b) of the Securities and Exchange Act of 1934 and set forth the climate in the lower courts around that time. In Part B, Petitioners demonstrate (1) how regulatory changes occurring at or near the time of this Court's landmark decisions have resulted in splits and confusion in the federal courts on two issues germane to this case, and, (2) how those regulatory changes have been interpreted in the lower courts to prevent an individual investor/borrower from resort to the courts under §§ 7 and 29(b) of the Exchange Act. In Part C, the present regulatory environment with regard to Regulation U is discussed and questions are raised regarding its impact on the status of cases in the lower courts. Finally, in Part D, Petitioners show how the confusion in the lower courts impacts the issues in this case.

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[3] According to a report issued by the Investment Company Institute and the Securities Industry Association in November 2005: "[H]alf of *all* U.S. households and one in three individuals own equities." See www.ici.org/shareholders/dec/05_news_equity_rpt.html.

A. THE COURT'S LANDMARK CASES AND THE LEGAL LANDSCAPE IN THE LOWER COURTS AT THE TIME.

1. *The Court's Landmark Cases: Mills and TAMA.*

In Mills v. Electric Auto Lite, 396 U.S. 375 (1970), plaintiff shareholders, pursuant to § 14(a) of the Exchange Act, sought to enjoin a corporate merger. Plaintiffs alleged the proxy solicitation contained materially misleading information. This Court ordered a remand to determine the rights of the non-violating party and discussed the results of voidness under § 29(b) as follows:

> We do not read § 29(b) of the Act...as requiring that the merger be set aside simply because the merger agreement is a "void" contract. This language establishes that the guilty party is precluded from enforcing the contract against an unwilling innocent party [fn9], but it does not compel the conclusion that the contract is a nullity, creating no enforceable rights in a party innocent of the violation
>
> [fn 9] See Eastside Church of Christ v.

> National Plan, Inc., 391 F.2d 357, 362-363 (C.A. 5th Cir. 1968); cf Goldstein v. Groesbeck, 142 F.2d 422, 426-427 (C.A. 2nd Cir. 1944).

Mills at 386-87.

Nine years later, in Transamerica Mortgage Advisors Inc. v. Lewis (TAMA), 444 U.S. 11 (1979), the Court addressed § 215 of the Investment Advisors Act which, like § 29(b), contained language declaring that contracts violating the Act are "void." In TAMA, this Court noted that the legislative history of § 215 was silent as to whether Congress intended a private right of action. Looking to the express language of the Act itself, the Court found that when Congress declared in § 215 that certain contracts were "void", it also intended all legal implications of voidness which included a suit for rescission. TAMA at 18. The Court also rejected the notion that use of the word "void" in § 215 evinced only an intent to permit voidness as a defense. Rather,

> the legal consequences of voidness are typically not so limited. A person with power to avoid a contract ordinarily may resort to a court to have the contract rescinded and to obtain restitution of consideration paid. * * * And this Court has previously recognized that a comparable provision, § 29(b) of the Security and Exchange Act of 1934 ... confers a "right to rescind" a contract void under the criteria of the statute. Mills v. Electic Auto-Lite Co., 396 U.S. 375, 388. Moreover, the federal courts in general have viewed such language as implying an equitable cause of action for rescission or similar relief.

TAMA at 246-247 (citations omitted).

Amidst these two decisions was Cort v. Ash, 422 U.S. 66 (1975). At issue there was whether a shareholder, pursuant to 18 U.S.C. § 610, could derivatively sue defendant corporation for money damages because it had used corporate funds for political advertising. Cort established a four factor test to determine whether an implied private right of action exists. Critically, the Cort v. Ash analysis was not employed in TAMA because the statute in TAMA made Congressional intent clear.

2. *The Legal Landscape in the Lower Courts at the time of Mills.*

When Mills was decided, there was relatively no question that an individual investor/borrower had a right to sue for money damages, as well as other available remedies. This was because § 7 of the Securities and Exchange Act made it unlawful for a lender to *extend credit* in violation of the Exchange Act, but did not make it unlawful for a borrower to *receive* credit.

Because of § 7, § 29(b) received rather infrequent attention. Although reliance upon § 29(b) was rare in 1970, it was equally favorable to the rights of borrowers as Mills makes clear. When Mills says that a guilty party may not invoke § 29(b) to enforce an illegal contract against an "unwilling innocent party", the Court cites Eastside Church, supra. Eastside Church, the plaintiff, sought to avoid bond transactions under § 29(b) because the defendant was not registered as required by the Exchange Act The Fifth Circuit concluded the transactions were "void" under § 29(b). The Court acknowledged "[t]he harsh remedy which this view dictates, even under the circumstances of this case where the churches chose the unfaithful agent, seems to be what

Congress intended. The fact that Congress removed certain violations from the voiding section of § 29(b) lends support to our construction of § 29(b)..." Eastside Church at 362, 363.

One year after Mills was decided amendments to § 7 altered the legal landscape dramatically.

B. REGULATORY CHANGES PROMPTED CIRCUIT SPLITS AND CONFUSION IN THE LOWER COURTS WHEN APPLYING THE COURT'S DOCTRINE.

1. 1971 Amendment to § 7.

In 1971, Congress amended § 7 of the Exchange Act by adding subsection f. For the first time, Congress put the onus for the violation of Exchange Act regulations on both the lender and the investor/borrower. Subsection (f) provided that borrowers who accept credit in violation of the SEC regulations are liable for the violation absent a prompt cure. 12 C.F.R. §§ 224.2(a), 224.6(a) (1971).

As a result of this change, it was clear Congress no longer intended to put the responsibility for compliance on lenders alone. Courts responded to this change in Congressional intent and began holding § 7 no longer authorized a private right of action for money damages for violations of the Exchange Act. See e.g., Bennett v. United States Trust Company of New York, 770 F.2d 308, 311 (2nd Cir. 1985), cert. den., 474 U.S. 1058 (1986) (no private right of action post-1971 amendments because "[p]rior to the enactment of subsection f it was only unlawful to extend credit in violation of the margin rules. Subsection f makes it also unlawful to accept credit in violation of those rules."); Gilman v. FDIC, 660 F.2d 688, 692 (6th Cir. 1981) ("Because borrowers now share the burden of observing margin requirements, the rationale for implying a private of action has disappeared"); Gutter v. Merrill Lynch, 644 F.2d 1194 (6th Cir. 1981), cert. den. 455 U.S. 909 (1982); Walck v. Am. Stock Exchange, 687 F.2d 778 (3rd Cir. 1982), cert. den., 461 U.S. 942 (1983), Compare Pearlstein v. Scudder & German, 429 F.2d 1136 (2d Cir. 1970), cert den., 401 U.S. 1013 (1971).

2. *Post 1971: Actions brought under § 29(b)*

Almost simultaneously with the impending doom of suits brought pursuant to § 7, litigants sought refuge under § 29(b) of the Exchange Act. In some actions, borrowers attempted to sue lenders, in others, lenders sued borrowers, in still others, the defendant attempted to raise § 29(b) as an affirmative defense to enforcement of the securities contract. The result of these events has littered the present legal landscape with confusing and uncertain case law.

a. Courts differ on whether § 29(b) confers a right of action to void a contract.

A body of case law holds or implies that *no private right of action* exists under § 29(b). These cases rely principally on the addition of § 7(f) and this Court's decision in Cort v. Ash, supra.

Bassler v. Central National Bank, 715 F.2d 308 (7th Cir. 1983), the most wide-sweeping of these, held there was no private right of action under §§ 7, 27, or 29(b) of the Exchange Act. Bassler acknowledged that this Court found a limited private right of action in TAMA arising from the language of § 215 of the Investment Advisors Act, language which closely tracks the language of § 29(b). But, Bassler held that this, standing alone, was insufficient. To imply a private right of action under Cort v. Ash, the Bassler court required other and independent clues that this was Congress' intent. Finding no such additional clues, and relying heavily on the new § 7 making borrowers liable for violations of margin regulations, the court found § 29 implied no private right of action. See also e.g., Amanda Acquisition Corp v. Universal Foods Corp, 70[illegible] F.Supp. 984 (E.D. Wis.1989), aff'd., 877 F.2d 496, cert. den., 493 U.S. 955 (1989); Cohen v. City Bank N.A., 954 F.Supp. 621 (S.D.N.Y. 1996) (as regards private investors); Hilbert v. Conseco, supra.

Other courts have held that § 29(b) *does* provide an implied right of action. The leading case in this regard is Regional Properties Inc. v. Financial and Real Estate Consulting Company, 678 F.2d 552 (5th Cir. 1982), appeal after remand, 752 F.2d 178 (5th Cir. 1985). The Fifth Circuit relied upon its own precedent, favorably cited by this Court, and this Court's opinions in Mills and TAMA. The 5th Circuit did not conduct any analysis of the Cort v. Ash factors, presumably because it, like this Court in TAMA, viewed Congress' intent fully expressed by selection of the "void" language of § 29(b). The Fifth Circuit, noting that § 29(b) was enacted for the protection of the market and the individual investor, held that a person may void a contract under § 29(b) if it is shown that (1) the contract involved a transaction prohibited by the Exchange Act; (2) there is contractual privity between the plaintiff and defendant; and (3) the plaintiff is in a class of persons that § 29(b) was designed to protect. See also Freeman v. Marine Midland Bank, US Dist Lexis 12177, *5-6 (E.D.N.Y. 1979) (Action brought under § 29(b) and Regulation U, court notes that a right of action under § 29(b) is "more express than implied," and that "plaintiff did not request an award of damages premised on an implied right of action theory).

Still other jurisdictions have acknowledged that a borrower may have a private right of action to void a contract under § 29(b). See e.g., Gilman v. Fed. Deposit Ins. Corp., supra at 694; Bache Halsey Stuart, Inc. v. Killop, 509 F.Supp. 256, 262-263 (E.D. Mich. 1979).

b. The lower courts differ on whether a defendant can affirmatively assert §29(b) to defend against a suit to enforce the contract.

The general thrust of the decisions finding that a defendant may not assert §29(b) as an affirmative defense rests in the notion that because there is no private right of action there cannot be an affirmative defense. In Banque Indosuez v. Pandeff, 193 A.D.2d 265 (N.Y. App. Div. 1993), the Court rejected a defense premised on the plaintiff's Regulation U violation. There, the court said "the interposition of an affirmative defense based on a section 7 violation would be the functional equivalent of asserting a cause of action" Id. at 303. Relying on Bennett, supra, the court found a private right of action could not be asserted because Congress did not intend to create such a right. The court recognized that its own cases were contrary but "declined to follow our previous holding" electing instead to hold that a "party who does not have a private right of action under section 7 to seek affirmative relief may not assert a defense based on the same violation." Pandeff, supra at 303. See also, Shearson Lehman v. M & L Investments, 10 F.3d 1510, 1515-16 (10th Cir. 1993) (applying New York law, and acknowledging contrary New York intermediate appellate court authority, court finds New York's highest court would likely hold no affirmative defense for

Regulation T violations). This rationale has been applied at least twice in litigation related to this case. The Indiana lower court here found that because there is no private right of action, there is, likewise, no right to bring an affirmative defense premised on a violation of Regulation U, the rationale being that in each instance the litigant seeks a judgment in her favor. The Indiana Court of Appeals cited this portion of the trial court's holding without disagreement [30a, 35a-36a].

Additionally, when Conseco filed for bankruptcy, the Banks allegedly demanded payment of the amounts guaranteed by Conseco pursuant to the Program. A committee of preferred security holders objected to the Banks' claims asserting that the loans violated Regulation U. The bankruptcy court ruled that the security holders did not have standing to object to the Banks' proofs of claim because there is no private right of action under Regulation U. Conseco argued below that there is functionally no difference between a defense to a claim in civil litigation and an objection to a claim in bankruptcy by a creditor that was not even a party to the loan transaction. See Hilbert v. Conseco, Indiana Court of Appeals Cause Number 29A02-0410-CV-00895, Brief of Conseco, pp. 41-43.

Leaning in the other direction are cases from this and lower courts. In TAMA, this Court suggested that Congress intended for § 215 of the Investment Advisors Act (which like § 29(b) makes certain contracts "void") to be raised defensively by a non-violating party to the transaction. "At the very least Congress must have assumed that § 215 could be raised defensively in private litigation to preclude the enforcement of an investment advisors contract." Id. 441 U.S. at 18. This is consistent with this Court's opinion in Kaiser Steel Corp v. Mullins et. al., 455 U.S. 72 (1982) where this Court held that "[any]one sued upon a contract may set up as a defence that it is a violation of the act of Congress, and if found to be so, that fact will constitute a good defence to the action..." Id. at 81 n.7, citing Bement v. National Harrow Co., 186 U.S. 70, 88 (1902). To do otherwise would amount to enforcement of an illegal promise. Kaiser Steel, supra.

Lower court cases explicitly recognizing the availability to raise the violation as an affirmative defense are the following cases: Regional Properties, Inc. v. Financial and Real Estate Consulting Company, supra at 559-560, 562 (5th Cir. 1982); Lawrence v. The Richmond Group of Connecticut, LLC, 407 F.Supp.2d 385, 389 (Conn. 2005); Couldock & Bohan v. Societe Generale, 93 F.Supp.2d 220 (Conn. 2000); Freeman v. Marine Midland Bank-New York, supra.

C. RECENT REGULATORY CHANGES ADD TO THE CONFUSION

Regulation X was amended again in December 1983 to protect private investors that were liable for margin violations under the 1971 version of Regulation X. *Compare* 12 C.F.R. § 224 (1971) with 12 C.F.R. § 224.1 (1983). The version of Regulation X enacted in December 1983 provides: "The following borrowers are exempt from the act and this part: (1) any borrower who obtains purpose credit within the United States *unless* the borrower willfully causes the credit to be extended in contravention of Regulation T or U." 12 C.F.R. § 224.1(b)(1983).[4] Borrowers who "inadvertently violate[]

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[4] See, SEC v. Parnes, 2001 U.S. Dist. LEXIS 21722, 23 (SDNY, 2001) (facts alleged in complaint sufficient to establish willful conduct because they amounted to accusation "that the defendants knew their deliberate behavior was illegal.")

this part" but thereafter promptly cure the violation are protected. 12 C.F.R. § 224.3(c)(1983). The 1998 amendment to Regulation X deleted the prompt cure requirement. See 12 C.F.R. § 224 (1998).

These revisions of Regulation X make clear that individual investors no longer automatically violate Regulation U by being a party to a loan transaction that violates Regulation U. Thus, most private investors are protected under Regulation X. This change in the regulatory environment raises serious questions about the continued viability of the lengthy line of cases which holds that a private investor has no private right of action under § 7 - as least as that body of law pertains to cases involving violations of Regulations U and T. This is so because it is no longer illegal for a buyer to *receive credit in violation of Regulation U or T* so long as receipt of that credit was not in willful violation of the rules. Specifically, Mr. Hilbert questions the viability of cases such as Gillman, supra; Gutter, supra; Bennett, supra; and Shearson Lehman Brothers Inc. v. M&L Inv., supra at 1516 (10th Cir. 1993) (borrower cannot assert affirmative defense because onus is on borrower).

D. THE DIVISION AND CONFUSION AMONG THE LOWER COURTS, ALONG WITH THE PRESENT REGULATORY ENVIRONMENT, ARE IMPLICATED BY THE INTERMEDIATE APPELLATE COURT'S DECISION IN THIS CASE.

The trial court granted summary judgment in favor of Conseco, holding *inter alia*: (1) the Services Notes did not extend credit for the purpose of buying or carrying stock nor were they secured by margin stock; and (2) Mr. Hilbert lacked standing because he had no private right of action under § 7, and as such could not assert Regulation U defensively.

Although it is somewhat difficult to tell exactly what the Indiana Court of Appeals found, it appears to have affirmed the grant of summary judgment on three grounds. First, it appears to hold there was no nexus between the Services Notes and any Regulation U violation:

> if the banks violated Regulation U, the banks might not be able to enforce the Principal Notes against an unwilling innocent party. But this is not an action by the bank seeking to enforce those notes. This is an action by Services seeking to enforce the Services Notes and the Guarantees.

[31a].

Second, it found that Regulation U violations may not be raised defensively. Finally, it stated:

> Even if we were to accept Hilbert's contention that TAMA, Mills, and Cohen allow him to raise a defense based upon his contention that the loans violate Regulation U, we would not find that it requires us to reverse the trial court's order. The designated evidence establishes *the undisputed fact that [Hilbert] was Chief Executive Officer and Chairman of the Board of Conseco at the time Conseco obtained the loans.*

[32a].[5]

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[5] The court also went on to note that "if it were now found that *contrary to the opinion of the many experts consulted by Conseco and the banks at the time*, the loans were in violation of Regulation U, there is no designated evidence that raises any inference that Hilbert

The issue and relevance of Mr. Hilbert's status as an "innocent party" was not briefed by the parties. Indeed, the state trial court made no findings on Mr. Hilbert's status as a non-violating party under Regulation U. Nonetheless, the state appellate court reached the issue, improperly making a factual finding of Hilbert's status as an "innocent party" on the basis of the single factor set forth above ~ disregarding undisputed facts concerning approval of the Programs by the Conseco Board of Directors and the admitted benefits to Conseco on the face of the Program documents. This Court should grant *certiorari* and hold that the present regulatory environment as regards violations of Regulation U and X provides borrowers with a right of action pursuant to §§ 7 and/or 29(b). The present regulatory environment shakes the foundation of § 7 cases such as Bassler, thus reviving § 7's usefulness to borrowers. Regulation X also places Petitioners in the class of persons it seeks to protect. This impacts the right to assert both §§ 7 and 29 defensively. The Fifth Circuit's application of this Court's decision in Mills and TAMA is principled and in line with the present regulatory environment. See, Regional Properties, supra. Once the appropriate analysis is applied as illustrated below, this Court should remand this case to the Indiana Court of Appeals for reconsideration.

As illustrated below, when the proper law is applied summary judgment against Petitioners cannot stand. Because the analysis under §§ 7 and 29(b) both

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was either an unwilling or an innocent party in the obtaining of the bank loans that he now argues violate Regulation U." [32a] (emphasis added). The expert counsel opinions about which the court speaks were solicited by Conseco *after* the Program loans were initiated.

involve similar elements, Petitioners' position as to each is set forth below but discussed within the three element-framework of Regional Properties, supra.

1. Contractual Privity

Petitioners are in contractual privity for purposes of the Regulation U analysis with both Conseco and the Program Lenders (in whose stead Conseco now seeks to stand with respect to the debt reflected by the Services Notes) under the 1996 Program and Additional Programs and the related financing documents.

Contractual privity is most clearly illustrated by the Program Loans which Conseco arranged and in which Conseco served as a guarantor. This contractual privity was furthered by the Services Notes and Credit Agreements in which all parties agreed that the "interest payments" which were owed to Conseco were to be paid not to Conseco, but to the lending banks and applied not to the interest, but to the principal on the Program Loans secured by margin stock (see Section 2, below). At a minimum if the Program Loans are illegal, then the related loans for interest payments on the same illegal Program Loans are also illegal, as they spring from and facilitated the same transaction.

2. A violation of Regulation U occurred

As set forth more fully in the Statement of Facts, Conseco common stock was publicly traded and the purchase, sale and trading of such stock was continually subject to federal securities laws. The Security and Exchange Act of 1934 authorizes the Federal Reserve Board to place limits on credit transactions used to finance the purchase of stock:

> For the purpose of preventing the excessive use of credit for the purchase or carrying of securities, the Board of Governors of the Federal Reserve System shall . . . prescribe rules and regulations with respect to the amount of credit that may be initially extended . . . on any security.

15 U.S.C. § 78g(a). In order to accomplish this purpose, the Reserve Board issued Regulation U, 12 C.F.R. § 221, which provides in pertinent part that: "Lenders may not extend more than the maximum loan value of the collateral securing such credit, as set by the Reserve Board in § 221.7." 12 C.F.R. § 221.1(b)(1). Section 221.7, in turn, provides: "the maximum loan value of any margin stock is fifty per cent of its current market value." 12 C.F.R. § 221.7(a).

Here, the Banks loaned 100% of the value of the margin stock and required that the stock be pledged as collateral to be held by the Banks. Since the Federal Reserve permits only 50% of the loan to be secured by margin stock, this is an apparent violation of Regulation U on its face.[6]

The Court of Appeals denied Petitioners a trial on the claim in part because "if the banks violated Regulation U, the banks might not be able to enforce the Principal Notes" but "this is not an action by the banks seeking to enforce those notes." [31a]. In essence, the Court of Appeals found that Conseco was entitled to summary judgment on this claim because the Services Notes were not for the purpose of purchasing or carrying margin stock as they were a separate contract unrelated to the Program Loan. But, neither the facts nor the law supports that conclusion.

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[6] Conseco has argued that there was no violation of Regulation U because of its guarantees and its negative pledge, i.e. agreement not to sell various assets of the company. Conseco offers no explanation as to the value of the assets subject to the negative pledge. In any event, the Federal Reserve "has long held the view that for purposes of Regulation U, a guaranty of a loan is not 'collateral' and therefore cannot be attributed any loan value". F.R.R.S. 5-917.8. Regardless, the lower courts did not address this claim.

Conseco initiated the Program Loans at the heart of this litigation. It then negotiated with the banks ~ banks with whom it did significant business ~ to extend credit for the purchase of Conseco stock. Conseco was a party to these loans when it guaranteed them. Conseco guaranteed principal and interest and advanced the interest. Without the principal notes, there would be no interest. Conseco dictated when and where its stock became available as well as the price that the Program Participants would pay for it. The interest and principal payments were separated but to suggest that they are distinguishable in a way that makes Regulation U inapplicable ignores the explicit terms of the Services Notes and the regulations governing margin requirements.

"[T]he original purpose of a loan is controlling." 12 C.F.R. § 221.101 (2006). There is no dispute that the purpose of the original loans was to purchase margin stock and without the principal debt there would be no interest. "[T]he purpose of the loan means just that." 12 C.F.R. § 221.101(d). The Services Notes were executed in furtherance of the original loans and were clearly to compel payment to the bank on the Principal Loans. The Services Notes, *by their express terms*, dictated that payments made pursuant to them were transferred to the Banks for payment on the principal due on the Program Loans until such time as that indebtedness was paid in full:

> [I]f Maker tenders to [Services] any payment of interest or principal (a"Payment") hereunder at a time when any of Maker's Program Loans are still outstanding then [Services] will deliver the amount of the Payment to the Banks to be applied to the Program Loans . . . .

Payment on the Services Notes would not reduce the borrower's indebtedness to Conseco Services one iota until such time as the Principal Loans were paid off. "Payment will not reduce in any manner or serve as a credit against any of Maker's indebtedness to [Services] for principal or interest evidenced by this Note." Payment on the Services Notes was in fact payment to the banks on the Program Loans and thus was directly tied to the Program Loans. That is, the lenders continued to extend credit to the Hilbert Trusts because the Services Notes generated additional principal payments on a loan secured by an illegal amount of margin stock.

The Indiana Court of Appeals also found that there was no viable Regulation U defense because there was no evidence that "raises any inference that Hilbert was either an unwilling or an innocent party in obtaining the bank loans". Hilbert v. Conseco at 1015. This conclusion rested solely on the finding that Mr. Hilbert was Chairman and CEO of Conseco at the time the 1996 Program was suggested to Conseco's board.

Putting aside the fact that one's management status in an insurance company does not necessarily equal the status of a sophisticated investment banker knowledgeable of the intricacies of securities law, the state court's legal conclusion illustrates doctrinal confusion. The elements of a Regulation U violation and the factors to be considered when fashioning the appropriate equitable remedy once the violation is proven are distinct inquiries. That is, the borrower's culpability in violating the margin requirements is generally relevant to whether the borrower may recover once the violation of Regulation U has been proven. See e.g., Serzysko v. Chase Manhattan Bank, 290 F.Supp. 74 (DCNY 1968), aff'd., at 409 F.2d 1360 (2nd Cir.), cert. den., 396 U.S. 904 (1969) (Regulation U was violated but borrower was denied monetary recovery due to wrongful conduct); Goldman v. Bank of Commonwealth, 467 F.2d 439 (6th Cir. 1972); Tartell v. Chelsea Nat. Bank, 351 F.Supp. 1071 (S.D.N.Y. 1972), aff'd at 470 F.2d 994 (2nd Cir.).

The above line of cases was decided prior to the passage of Regulation X in its current form. As mentioned previously, Regulation X now places the responsibility for the violation on both the bank and the borrower who "willfully" receives credit in violation of the margin requirements. This distinction is not relevant here, however, because there was and is simply no proof that Mr. Hilbert willfully violated Regulation U. To the contrary, Conseco itself introduced evidence that the Board of Directors sought outside counsel opinions ~ even if those opinions turned out to be flawed.

2. *The borrowers are members of the class to be protected*

Mr. Hilbert and the Trusts he guaranteed with respect to the Services Notes are in the class of persons to be protected by Regulation U, and § 29(b). Individual investors are one of the classes protected under Regulations U and X, particularly since Regulation X was amended in December 1983 to protect private investors that were liable for margin violations under the 1971 version of Regulation X. Compare 12 C.F.R. § 224 (1971) with 12 C.F.R. § 224.1 (1983).

The revisions of Regulation X make clear that individual investors no longer automatically violate Regulation U by being a party to a loan transaction that violates Regulation U. Rather, these investors are protected persons under Regulation X. As a result, the borrowers here are protected person under Regulations U and X.

Section 29(b) does not by its terms limit the class of persons who may invoke its contractual voidness provisions to investors. The provision was "enacted to protect the public interest and the individual investor." Regional Properties, supra, at 561. The borrowers here are protected by § 29(b) as well. The Exchange Act was also promulgated in order to protect individual investors. See e.g., In re Gas Reclamation Inc Securities Litigation, 733 F.Supp. 713 (S.D.N.Y. 1990).

CONCLUSION

The Indiana Court of Appeals held that because there was no implied right of action there was no right to assert the voidness of the contracts defensively. The state court's conclusion rests in the doctrinal confusion spawned by regulatory changes and splits in the lower courts on the effect of this Court's precedents. For this reason, the Court should grant certiorari to resolve the disarray in the lower courts.

Respectfully submitted,
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(any footnotes trail end of each document)

Stephen C. Hilbert, et al v. Conseco Services, LLC

[NO NUMBER IN ORIGINAL]

SUPREME COURT OF INDIANA

2006 Ind. LEXIS 232

March 16, 2006, Decided

NOTICE: DECISION WITHOUT PUBLISHED OPINION

OPINION: Transfer Denied.

No. 29A02-0410-CV-895
COURT OF APPEALS OF INDIANA,
SECOND DISTRICT

STEPHEN C. HILBERT; the THOMAS C. HILBERT IRREVOCABLE TRUST; the THOMAS C. HILBERT IRREVOCABLE TRUST II; the STEPHEN C. HILBERT AND STEPHEN C. HILBERT AUGUST 1998 TRUST; the TODD S. HILBERT IRREVOCABLE TRUST; the CHRISTOPHER L. MYERS IRREVOCABLE TRUST; and the HEATHER DAWN HILBERT IRREVOCABLE TRUST,
Appellants-Defendants,

vs.

CONSECO SERVICES, L.L.C.,
Appellee-Plaintiff.

November 8, 2005, Decided

COUNSEL: FOR APPELLANTS: DANIEL P. BYRON, KARL L. MULVANEY, PHILLIP J. FOWLER, Bingham McHale LLP, Indianapolis, Indiana.

FOR APPELLEE: RYAN L. LEITCH, WILLIAM P. MEANS, JAIME L. MEYER, Riley Bennett & Egloff, LLP, Indianapolis, Indiana; SCOTT A. MCMILLIN, Kirkland & Ellis LLP, Chicago, Illinois.

JUDGES: DARDEN, Judge. MATHIAS, J., and RILEY, J., concur.

OPINIONBY: DARDEN

OPINION: OPINION - FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Stephen C. Hilbert ("Hilbert"), individually, and as trustee for the Thomas C. Hilbert Irrevocable Trust, the Thomas C. Hilbert Irrevocable Trust II, the Stephen C. Hilbert Trust, the Todd S. Hilbert Irrevocable Trust, the Christopher L. Myers Irrevocable Trust, and Heather Dawn Hilbert Irrevocable Trust (collectively, "the Hilbert Trusts"), and other defendants[1] appeal the trial court's order granting partial summary judgment to Conseco Services, LLC ("Services") on its complaint against Hilbert, the Hilbert Trusts, and the other defendants.[2]

We affirm.

ISSUES

1. Whether the trial court erred in granting summary judgment because there was a genuine issue of material fact as to Hilbert's liability based on the "change of control" provision in the early stock purchase plans.

2. Whether the trial court erred in granting summary judgment because there was a genuine issue of material fact as to Hilbert's entitlement to equal treatment pursuant to terms of a certain agreement.

> 3. Whether the trial court's grant of summary judgment must be reversed because Hilbert is not barred from asserting Regulation U as a defense to liability.

FACTS

In 1979, Hilbert and a partner co-founded Conseco, Inc. ("Conseco").[3] In 1995, with Conseco as its holding company, Services was created as a wholly owned subsidiary to provide administrative services to Conseco.

On March 12, 1996, Conseco's Board of Directors held a special meeting. As Chief Executive Officer of Conseco and Chairman of its Board of Directors, Hilbert explained to the Board that

> the meeting had been called primarily to consider a proposal . . . to establish a plan under which management and Board members could purchase shares of Conseco common stock at current market price with payment for the shares being deferred over several years . . . .(App 447). Hilbert discussed "management's recommendation" for such a plan, and the Board then unanimously passed the resolution toadopt a stock purchase plan for participation by its Directors and Senior executive officers under which the participants will be eligible to purchase in open market transactions shares of the Company's common stock with the proceeds of guaranteed financing arranged by the Company.

(App. 447, 448).

The initial terms and conditions of the stock plan were set forth in the April 1996 "Conseco, Inc. Director, Executive and Senior Officer Stock Purchase Plan." ("1996 Plan"). (App. 391). An "amended and restated" plan of August 1997 ("1997 Plan") "completely superseded and replaced" the 1996 Plan. (App. 399, 406). In July of 1998, the 1997 Plan was "amended and restated" as the "Director, Officer and Key Employee Stock Purchase Plan" ("1998 Plan"), which "completely superseded and restated" the 1997 Plan. (App. 418, 426). A "1999 Director and Executive Officer Stock Purchase Plan" was effective September 2, 1999 ("1999 Plan").[4] (App. 428). Thereafter, on November 2, 1999, the 1998 Plan was "amended and restated." ("1998 Amended Plan"), and the 1999 Plan was "amended and restated" ("1999 Amended Plan") as well (collectively, "the D&O Plans"). (App. 418, 437).

Pursuant to the program established by these D&O Plans, certain banks loaned money to the authorized participants, which included their affiliated trusts; the participants used the money borrowed from these banks to purchase Conseco stock in the open market; and the participants executed promissory notes in favor of the banks for the funds borrowed ("the Principal Notes") and pledged the stock purchased through the program as collateral for the loans. As additional collateral, Conseco guaranteed the participants' obligations on the Principal Notes to the banks. Conseco's guarantees to the banks also contained a "negative pledge" restricting Conseco's ability to grant security interests in its assets. (App. 1556). The Hilbert Trusts elected to participate in the D&O Plans, borrowing nearly $ 162 million through the years 1996, 1997, 1998, and 1999 from the banks to purchase approximately 5.8 million shares of Conseco stock.

The banks charged interest on the loans made to the Hilbert Trusts. However, consistent with the D&O Plans, participants could elect to have Services advance to them the funds to cover the interest and fees charged by the banks on the Principal Notes. The Hilbert Trusts elected to have Services make these payments, and promissory notes were executed in favor of Services to repay the interest advanced on behalf of the Trusts.

In April of 2000, Hilbert and Conseco decided to terminate Hilbert's employment with the company. On April 28, 2000, Conseco accepted Hilbert's resignation as President and CEO. The parties entered into a written agreement ("Termination Agreement") under which Hilbert was to serve as a consultant "during a three year term," *i.e.*, until April 28, 2003. (App. 453).

On November 22, 2000, the outstanding promissory notes between the Hilbert Trusts and Services were refinanced.[5] New promissory notes that "superseded and replaced all of the currently outstanding promissory notes" were executed in favor of Services ("Services Notes") for the funds Services had already advanced and would advance in the future to pay interest and fees on the bank loans. (App. 96, 100, 104, 108, 112, 116). Pursuant to the Services Notes, the Hilbert Trusts unconditionally promised to pay the amounts that had been advanced or would be advanced in the future by Services to the banks. Also on November 20, 2000, Hilbert executed a series of unconditional guarantees ("the Guarantees") in favor of Services wherein he personally guaranteed payment of all liabilities incurred by the Hilbert Trusts, including the liabilities of the Hilbert Trusts under the Services Notes. The maturity date for the Services Notes was February 28, 2001.

On April 3, 2001, Hilbert signed a letter agreement ("the Letter Agreement") in which he agreed to make three payments totaling $ 17 million[6] to the banks towards the Hilbert Trusts' obligations and to provide Conseco with a mortgage on the Hilberts' Carmel mansion as collateral. In exchange, Services would forgo immediate collection on the Services Notes and would continue to advance funds to cover the interest and fees on the Principal Notes.

On October 16, 2001, Hilbert -- as trustee of the Amended Hilbert Residence Trust -- also executed a mortgage granting Services a security interest in Hilbert's mansion ("the Mortgage"). Consistent with the terms of the Letter Agreement, the Mortgage "secured performance" of the obligations of the Hilbert Trusts pursuant to the terms of the Services Notes. According to the Mortgage's default terms, upon failure to comply with the terms of the Letter Agreement, "the entire indebtedness shall, at the option of the Mortgagee, immediately become due and payable . . . ." (App. 244).

Hilbert made the first two payments ($ 1 million and $ 6 million, respectively) as required by the Letter Agreement. However, Hilbert did not make the $ 10 million payment due in April of 2003.

On October 20, 2003, Services filed a six-count complaint against Hilbert, the Hilbert Trusts, and the other defendants. The complaint included counts asserting (1) a claim for breach of the Service Notes; (2) a claim for breach of the Letter Agreement; and (3) a claim for an order of foreclosure on the Mortgage. Submitted with the complaint were the Services Notes; calculations of the amounts due and owing as of June 30, 2003 on each note; the Guarantees; the Letter Agreement; and the Mortgage (which had been recorded).

On December 4, 2003, Services filed a motion for partial summary judgment on these three counts. Designated evidence in support of Services' motion included the Services Notes; the Guarantees; the Letter Agreement; the Mortgage; and an affidavit by John Kline, senior vice president and chief accounting officer of Services. Services argued that pursuant to the terms of the Services Notes, the Letter Agreement, and the Mortgage, it was entitled to judgment as a matter of law against the Hilbert Trusts; that pursuant to the terms of the Guarantees, it was entitled to judgment as a matter of law against Hilbert; and that pursuant to the terms of the Mortgage, it was entitled to a judgment of foreclosure on Hilbert's mansion.

On December 17, 2003, Hilbert filed an answer of general denial and asserting various affirmative defenses: (1) that the loans from the banks were illegal under a Federal Reserve System regulation known as "Regulation U," and that this illegality excused the obligations of the Services Notes; (2) that a "change of control" provision in the D&O Plans required Conseco to repurchase the stock purchased; (3) that pursuant to the terms of the Termination Agreement, Conseco was required to forgive much of the Hilbert Trusts' debts; and (4) that Conseco fraudulently induced Hilbert and the Hilbert Trusts to execute the Services Notes and Guarantees.

Hilbert sought and was granted six months to conduct discovery and to file a responsive brief. On June 25, 2004, Hilbert filed his response to Services' motion for partial summary judgment. The designated evidence included a seventeen-page affidavit by Hilbert. Also submitted, in support of Hilbert's affidavit and the responsive brief, were *inter alia* the various D&O Plans; confidential Conseco internal documents (submitted under seal); a number of newspaper articles; and transcripts of bankruptcy[7] and other court proceedings. Hilbert argued that the D&O Loans were "void and unenforceable as a matter of law" because they were made by the banks in violation of Regulation U, with the result that no interest could have "lawfully accrued on those loans." (App. 335). Hilbert further argued because all the D&O Plans until the November 1999 amendments had "change of control" provisions, and there had been a "change of control" of Conseco in 2000 and post-bankruptcy, he could only be found liable for the interest owed on D&O Plan stock purchased subsequent to the date he agreed to the amendment -- which he entered into believing that its application was prospective from the effective date of November 11, 1999. Therefore, Hilbert's argument continued, there was a disputed material fact as to the amount of interest owed. In addition, Hilbert argued that because the Termination Agreement specified that Conseco would continue to treat Hilbert as it treated other participants in the D&O Plans, and that some of these other participants had had their obligations under the

Plans reduced to "less than eight (8) cents on the dollar," there was a disputed material issue of fact as to the interest Hilbert and the Hilbert Trusts owed Services on the loans. (App. 347). Finally, Hilbert argued that based upon Hilbert's affidavit, it was a question of fact for the jury to decide whether the misleading, misrepresented and withheld information from Conseco to Hilbert regarding Conseco's financial condition constituted fraudulent, bad faith, and inequitable conduct such that the doctrine of unclean hands should bar the equitable remedy of foreclosure sought by Services.

Services filed a brief in response, submitting therewith another affidavit by Kline; legal opinions provided to Conseco and the banks as to the compliance with Regulation U of the bank loans for the D&O Plan purchases; the bank agreements; and various other evidence. Services argued that despite Hilbert's extensive brief, lengthy personal affidavit, and voluminous evidentiary submissions, "Hilbert only raised legal issues . . . [which] can be disposed of as a matter of law." (App. 1057). According to Services' response, *inter alia* Regulation U did not apply to the Services Notes; Hilbert did not have standing to raise Regulation U as a defense to liability; the D&O loans did not violate Regulation U; Conseco's guarantees of the D&O loans to the Plan participant borrowers did not violate Regulation U; and contemporaneous legal opinions and Federal Reserve advice had confirmed compliance with Regulation U. Services also argued that the "change of control" provisions did not apply to the obligations incurred by Hilbert and the Hilbert Trusts and that there had been no "change of control" as defined by the D&O Plans. Further, Services argued that the Termination Agreement was between Hilbert and Conseco, and Services was not a party to it; the Termination Agreement had expired before the adjustments cited by Hilbert had been effected; and that Hilbert had been treated the same as other participants in his circumstances. Finally, Services argued that the fraudulent conduct alleged by Hilbert would not preclude a grant of summary judgment to Services.

Hilbert filed a surreply and submitted another affidavit by Hilbert and other evidence. Hilbert argued that there was "no meaningful distinction between Conseco and [] Services for the purposes of the [D&O Plans] and this lawsuit." (App. 1990). Hilbert again argued that the D&O Plan loans violated Regulation U, precluding the recovery by Services of any interest; that the amended "change of control" language was only accepted by Hilbert as applying prospectively -- after November 8, 1999, and that there had been such a "change of control" at Conseco; that his liability should be reduced consistent with that of other participants; and that the conduct of Conseco and Services precluded foreclosure of the Mortgage.

The trial court held a hearing on September 21, 2004, at which it heard more than two hours of argument from counsel for both sides. Subsequently, the trial court received, "read, and considered" post-trial briefs from both sides. (App. 30). On October 20, 2004, the trial court issued its order granting partial summary judgment to Services on its claims for breach of the Services Notes and the Guarantees and for an order of foreclosure on Hilbert's mansion. The trial court found "no dispute between the parties regarding the authenticity of the Services Notes, the Guarantees, the [Letter] Agreement, or the Conseco Services Mortgage." (App. 33). The trial court also found it undisputed that as of June 30, 2003, Services had advanced more than $ 62 million on behalf of the Hilbert Trusts; that Services had been paid nothing by either Hilbert or the Hilbert Trusts; that Hilbert failed to make the $ 10 million April 2003 payment required by the Letter Agreement; and that such failure constituted a default under the Mortgage. The trial court then found that Hilbert's defenses as to Regulation U, the change of control provision, application of the Termination Agreement, and fraudulent inducement[8] had failed as a matter of law. Accordingly, the trial court granted Services an *in rem* judgment against the mortgaged property, Hilbert's mansion; a personal judgment against the Hilbert Trusts in the aggregate amount of $ 62,712,557.85 as of June 30, 2003, plus interest; a personal judgment against Hilbert as the guarantor in the same amount; and a decree of foreclosure.

DECISION

Summary judgment is only appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Stephenson v. Ledbetter*, 596 N.E.2d 1369, 1371 (Ind. 1992) (citing Ind. Trial Rule 56(C)). The burden is on the moving party to prove there are no genuine issues of material fact and it is entitled to judgment as a matter of law. Id. Once the movant has sustained this burden, the opponent must respond by setting forth specific facts showing a genuine issue for trial. Id.

The trial court's decision on a motion for summary judgment enters the process of appellate review clothed with the presumption of validity. Id. The party appealing from the grant of summary judgment must persuade the appellate court that the judgment was erroneous. Id. As the reviewing court, we face the same issues that were before the trial court, and we follow the same process. Id.

In the summary judgment context, the appellate court is not bound by the trial court's specific findings of fact and conclusions of law. *Rice v. Strunk*, 670 N.E.2d 1280, 1283 (Ind. 1996). These merely aid our review by providing us with a statement of reasons for the trial court's actions. Id. Further, we are not limited to reviewing the trial court's reasons for granting summary judgment, and we will affirm a grant of summary judgment if it is sustainable on any theory or basis found in the record. *Stephenson*, 596 N.E.2d at 1371.

Courts are required to give effect to parties' contracts, and to do so, courts look to the words of the contract. *MPACT Const. Group v. Superior Concrete*, 802 N.E.2d 901, 910 (Ind. 2004). When Indiana courts are called upon to interpret a contract, we apply the "four-corners" rule, which "requires that as to any matter expressly covered" in the written contract, "the provisions therein, if unambiguous, determine the terms" of the contract. *East v. Estate of East*, 785 N.E.2d 597, 601 (Ind. Ct. App. 2003) (citing *Hauck v. Second Nat'l Bank of Richmond*, 153 Ind. App. 245, 260, 286 N.E.2d 852, 861 (1972)). Words used in a contract are to be given their usual and common meaning unless, from the contract and the subject matter thereof, it is clear that some other meaning was intended. *Exide Corp. v. Millwright Riggers, Inc.*, 727 N.E.2d 473, 478-79 (Ind. Ct. App. 2000), trans. denied. We interpret a written contract by reading the contract as a whole, and we attempt to construe the language so as to not render any words, phrases, or terms ineffective or meaningless. *Abbey Villas Dev. v. Site Contractors*, 716 N.E.2d 91, 100 (Ind. Ct. App. 1999). Thus, we must accept an interpretation of the contract which harmonizes its provisions. Id. If the language of the contract is unambiguous and the intent of the parties is discernible from the written contract, the court must give effect to the terms of the contract. *Stenger v. LLC Corp.*, 819 N.E.2d 480, 484 (Ind. Ct. App. 2004), trans. denied.

1. D&O Plans and the Change of Control Provisions

According to the 1996 Plan, the 1997 Plan, the 1998 Plan, the 1999 Plan, the 1998 Amended Plan, and the 1999 Amended Plan, Conseco "reserved the right to change or discontinue this Plan by action of the Board of Directors in its discretion" and further "to terminate the Plan." (App. 397, 406, 416, 434, 435, 426, 443, 444). As noted above, the 1996 "Director, Executive and Senior Officer Stock Purchase Plan" [9] was "amended and restated" by the 1997 "Director, Executive and Senior Officer Stock Purchase Plan." (App. 391, 399). In 1998, the Board adopted the "Amended and Restated Director, Officer and *Key Employee* Stock Purchase Plan," which allowed "a key employee of the company selected by the Directors *or by the Chief Executive Officer* of Conseco" to participate in the plan. (App. 408) (emphasis added). In 1999, the Board adopted the 1999

Plan, effective September 7, 1999, with participant eligibility limited to "a non-employee Director of the Company or an executive officer of the Company." (App. 428). Finally, on November 2, 1999, both the 1998 Plan and the 1999 Plan were "amended and restated." (App. 426, 444).

The 1996 Plan contained a "change of control" provision designated as Section 10. A Conseco "change of control" is defined as "a change of control of a nature that would be required to be reported in response to Item 6(e) of Schedule 14A of Regulation 14A promulgated under the Securities-Exchange Act of 1934"; or when a person becomes a "beneficial owner" representing 25% or more of the combined voting power of Conseco stock; or when as a result of a

> tender offer, merger, consolidation, sale of assets, or contest for election of directors or any combination of the foregoing transactions or events, individuals who were members of the Board of Directors of Conseco immediately prior to any such transaction or event shall not constitute a majority of the Board of Directors following such transaction or event.

(App. 394, 395). The 1997 Plan, 1998 Plan, and 1999 Plan contained the same language, but was identified in those plans as Section 12. (App. 403, 404; 413, 414; 432, 433). The provision further states that when there is such a change of control, each D&O Plan participant "shall be paid" either "the purchase price paid for all of each Participant's Purchased Shares, respectively, plus all interest paid by each respective Participant under the Loan or . . . the amount of the consideration to be paid for the Purchased Shares in connection with the Change of Control," whichever is higher. (App. 395, 404, 414, 433).

At a special meeting of the Conseco Board of Directors held on November 2, 1999, "Hilbert, Chairman of the Board, presided" and "discussed the change of control provisions" in Conseco's 1999 Plan and its "Amended and Restated Director and *Key Employee* Stock Purchase Plan," *i.e.* the 1998 Plan. (App. 1830) (emphasis added). At the meeting, the Board *unanimously* adopted a resolution to add "to the end of the last sentence of Section 12" of the 1998 Plan this caveat: that Section 12 "shall not apply to any Participant (i) who was a Director and/or executive officer of Conseco as of November 1, 1999 or (ii) who consents in writing at any time to have such provision not apply to such person." (App. 1830). The Board also *unanimously* resolved that the 1999 Plan was "amended by deleting in its entirety Section 12 thereof." (App. 1831). Thus, the change of control provision contained in the 1998 Amended Plan no longer applied to Hilbert -- who at that time was Chairman of the Board of Conseco.[10] Moreover, the 1999 Amended Plan contained no change of control provision In addition, on November 8, 1999, Hilbert -- individually, and as trustee for the Hilbert Trusts -- executed "Stock Purchase Plan Consent[s]" stating that he "consented to the "revision of Section 12" of the 1998 Plan "to provide that such section shall not apply to the undersigned," and further "consented" to "the deletion in its entirety of Section 12 of the 1999" Plan. (App. 1822 - 1828).

In addition, the D&O Plans contained a provision specifying that despite the Board's discretion to change their terms,

> in the case of any person to whom benefits under this Plan had accrued upon termination of employment prior to such Board of Directors action, or in the case of any Participant who would have been entitled to benefits under this Plan had the Participant's employment ceased prior to such change or discontinuance, the benefits such person had accrued under this Plan prior to such change or discontinuance shall not be adversely affected thereby.

(App. 397, 406, 416, 426, 434-35, 443-44). Immediately following is this clause of qualification:

> Notwithstanding anything herein to the contrary, nothing contained herein shall restrict the Company's right to terminate the Plan.

(App. 397, 406, 416, 426, 435, 444).

According to Hilbert's affidavit, "immediately before" his April 28, 2000 "Termination Agreement,"

> Conseco's Board of Directors consisted of [Hilbert], Rollin Dick, Dennis Murray, Ngaire Cuneo, David Decatur, James Massey, Donald Gongaware, David Harkins, Phil Hathaway, John Mutz, Lawrence Coss and Robert Nickoloff.

(App. 377; see also App. 692). Only five of these individuals serving on Conseco's Board on April 28, 2000 remained on its Board as of December 12, 2000.

Further changes in the Board's composition were made when Conseco emerged from bankruptcy.

As to Hilbert's defense based on the change of control term in the D&O Plans, the trial court concluded as follows:

> None of the operative D&O [] Plans contain change of control provisions that apply to Hilbert or the Hilbert Trusts. The two operative D&O [] Plans (the Amended 1998 and 1999 Plans) were amended and restated to exclude Hilbert and the Hilbert Trusts from the change of control benefits prior to the events that Defendants now contend constituted changes of control. Thus, even if those events constituted a change of control, they would not apply to Hilbert or the Hilbert Trusts. Hilbert executed written agreements in which he specifically consented to the deletion of the change of control provisions from the Amended and Restated 1999 Plan and the modification of the Amended and Restated 1998 Plan to exclude him from the benefits of the change of control provision. Thus, the Court finds that the change of control provisions have no application to Hilbert or the Hilbert Trusts.
>
> Defendants' contention that these modifications of the two plans applied only to subsequent purchases of the stock, rather than subsequent changes of control, contradicts a plain reading of the D&O Plans in question. Defendants' interpretation would render the effect of the amendments meaningless because all stock

> purchases under the two plans were completed months before either plan was amended.

The Court finds that there is no genuine issue of material fact on the subject of change of control that would defeat [] Services' claims for summary judgment. (App. 37-38).

Hilbert argues on appeal, as he did to the trial court, that once adopted, D&O Plan terms could not be changed retroactively. Thus, according to Hilbert, the 1998 Amended Plan and the 1999 Amended Plan -- which, as amended on November 2, 1999, provide that the change of control provision is not applicable to Hilbert *or* is not part of the plan -- are only effective prospectively. As a result, he concludes, the change of control provisions in the earlier D&O Plans would apply and relieve him of liability on the Services Notes for stock purchased before November 8, 1999, and the only interest and fees owed to Services on the Services Notes is on "the Hilbert Trusts' post-November 8, 1999 purchases," which interest is in the amount of "$ 5,761,676 as of June 30, 2003." (App. 381). Therefore, Hilbert concludes, there is a genuine issue of material fact concerning the amount of his liability. We cannot agree.

As already noted, the 1996 Plan, the 1997 Plan, the 1998 Plan, and the 1999 Plan *each* contained a provision whereby Conseco "reserved the right to change or discontinue" or "terminate" the plan by action of the Board of Directors at its discretion. (App. 397, 406, 416, 434, 435, 426, 443, 444). The language of the D&O plans crafted by Conseco and presented to its Board by Hilbert -- Conseco's co-founder, who was serving as

CEO and Chairman of the Board when the Board adopted these plans -- expressly provided for the plans to be changed. There is no language in the plans which states that any changes made thereafter would only apply prospectively.

Further, the language of the succession of plans at issue clearly expresses the parties' intent as to the changes made. The initial D&O plan was the 1996 Plan. The 1996 Plan was expressly "amended and restated" by the adoption of the 1997 Plan, which "completely superseded" the 1996 Plan. (App. 399, 406). To "amend" is to "change the wording of" or "alter," and to "restate" is to "state again or in a new form." BLACK'S LAW DICTIONARY 80 (7th ed. 1999); WEBSTER'S 3D INT'L DICTIONARY 1936 (1976). In *Bielat v. Folta*, 141 Ind. App. 446, 228 N.E.2d 888, 892 (1967), we held that a Supreme Court Rule used the word "supersede" in "its ordinary dictionary meaning, viz: 'To set aside or cause to be set aside as invalid . . . . to supplant.'" The Black's Law Dictionary meaning of "supersede" is to "annul, make void, or repeal by taking the place of." BLACK'S at 1452. And the dictionary meaning of "completely" is "entirely." WEBSTER'S at 465. Hence, according to the words used by the parties, after the adoption of the 1997 Plan, there no longer was a 1996 Plan because the 1997 Plan expressly changed the wording of the 1996 Plan, stated it in a new form, and entirely repealed it -- leaving in its stead the 1997 Plan.

Thereafter, the 1998 Plan stated that it "amended and restated" the 1997 Plan and "completely superseded and restated" the 1997 Plan; hence, at that point there no longer was a 1997 Plan but only the 1998 Plan. (App. 418, 426). In September of 1999, a new plan was adopted -- the 1999 Plan; the terms of the 1999 Plan did not state that it superseded the existing plan, and its eligible participants were different than those in the 1998 Plan. Thus, in October of 1999, there were in effect two plans: the 1998 Plan and the 1999 Plan. However, on November 2, 1999, those two plans were unanimously amended by the Board -- a Board that contained Hilbert as a member, its chairman and the CEO of Conseco. The Amended 1998 Plan expressly and unambiguously states that it "amend[s] and restate[s]" the 1998 Plan, and the Amended 1999 Plan expressly and unambiguously states that it "amend[s] and restate[s]" the 1999 Plan. (App. 426, 444).

We read the written contractual terms of the D&O Plans to express the parties' intent that after November 2, 1999, all stock purchased by participants in the D&O stock ~~purchase~~ plans was to be held pursuant to the terms of either the Amended 1998 Plan or the Amended 1999 Plan. Pursuant to the action of the Board on November 2, 1999, neither of those plans contains a change of control provision applicable to Hilbert.

Nevertheless, Hilbert claims that pursuant to *SSD Control Technology v. Breakthrough Technologies, Inc.*, 685 N.E.2d 1136 (Ind. Ct. App. 1997), trans. denied, the "supersedes" language of the amended plans is not dispositive. Hilbert cites SSD's statement that "a substituted contract will not result in a party waiving its right to sue under the first contract, unless the substituted contract shows such an intention by the parties." 685 N.E.2d at 1137. However, we believe the meaning of the statement in SSD must be found by reference to its facts, *i.e.*, the facts giving rise to the statement quoted.

In SSD, the parties had an initial contract dated September 1, 1995. There arose a dispute about SSD's alleged failure to pay commissions owed under that 1995 contract. On September 1, 1996, at which time disputed commission claims were "already in existence," BTI and SSD entered into a new contract. *Id.* at 1138. The 1995 contract contained a choice of forum provision; the new 1996 contract did not. After the 1996 contract was executed, BTI brought a breach of contract action and sought to invoke the choice of forum provision. SSD cited language of the 1996 contract as follows:

> This Agreement contains the entire agreement of the parties and there are no other promises or conditions in any other agreements whether oral or written. This Agreement supersedes any prior written or oral agreements between the parties.

Id. According to SSD, this language extinguished BTI's right to invoke the forum selection clause provision of the 1995 contract. The trial court disagreed, and we affirmed. We noted that the 1996 contract contained "no language stating that BTI waived claims already in existence against SSD, nor . . . language that BTI released SSD from liability existing at the time the agreement was signed." Id. Therefore, "the claims arising under the 1995 contract were not extinguished by the subsequent agreement, and because they arose under the old contract," they were "controlled by its terms." Id.

SSD applies the law of novation, whereby a subsequent agreement requires "language, either express or implied, which indicates an intention to 'create a novation, relieve contractual liabilities, substitute parties, or extinguish the old contract'" in order to effectively waive a right under the first contract. Id. (quoting *White Truck Sales of Indianapolis, Inc. v. Shelby Nat'l Bank*, 420 N.E.2d 1266, 1271 (Ind. Ct. App. 1981)). Here, we do not find the language in the D&O Plans to broadly refer to "other promises or conditions in any other agreement whether oral or written" as in SSD. 685 N.E.2d at 1138. Rather, each subsequent D&O Plan agreement contained express language indicating the parties' intent that it "supersede" the specific previous plan; and the 1998 Amended Plan and the 1999 Amended Plan expressed their intent to "amend and restate" the 1998 Plan and the 1999 Plan. Therefore, consistent with SSD, because each subsequent agreement expressed the parties' *intent* to repeal the agreement being amended, it effectively extinguished any claim under the previous agreement.

Moreover, Hilbert does not assert any claim that was "already in existence" *at the time of the November 1999 amendments* to the 1998 Plan and the 1999 Plan so as to invoke application of the change of control provision at that time. Id. Indeed, Hilbert's assertion as to a change of control was the changed composition of the Board that occurred in December of 2002 and later.

Hilbert also argues that specific language in the plans "locked-in" certain rights of participants which were provided in the change of control provision. This referenced language stated that despite the Board's discretion to change terms of the D&O plans,

> in the case of any person to whom benefits under this Plan had accrued upon termination of employment prior to such Board of Directors action, or in the case of any Participant who would have been entitled to benefits under this Plan had the Participant's employment ceased prior to such change or discontinuance, the benefits such person had accrued under this Plan prior to such change or discontinuance shall not be adversely affected thereby.

(App. 397, 406, 416, 426, 434-35, 443-44). However, we do not find this provision apposite to the facts of this case. Hilbert's employment had not been terminated prior to the Board's November 1999 action of amending the plans. Further, as just discussed, there was no claim invoking the change of control provision at the time of the November 1999 amendments. To interpret this provision as meaning that any term of a D&O Plan would forever be preserved if the participant were ever terminated would render meaningless the provision in the 1996, 1997, 1998, and 1999 D&O Plans allowing them to be changed. See App. 397, 406, 416, 434. Such an interpretation is unacceptable. See *Abbey Villas*, 716 N.E.2d at 100. Therefore, this provision must be interpreted as allowing a participant whose employment was terminated to invoke a benefit in a provision that has been changed *if* the benefit was one in existence at the time of the change. Because, as already observed, a claimed change of control did not occur before the 1999 amendments, Hilbert's argument in this regard fails.

Finally, Hilbert asserts that even if the terms of the plans allowed for retroactive modification, such modification required that there have been consideration, citing *Hamlin v. Steward*, 622 N.E.2d 535, 539 (Ind. Ct. App. 1993). However, in Hamlin the original contract did not contain a term stating that the contract could be changed by one party. Here, as repeatedly noted, the 1996, 1997, 1998, and 1999 D&O Plans each contained a term whereby Conseco expressly reserved the right to change the plan -- at the discretion of its Board, of which Hilbert was Chairman at the times the changes were made. As we have previously held,

> Fundamental contract law provides that original contracts may provide for modification. A contractual provision so changed is as voluntary and consensual as the original contract.

Kuehl v. Terre Haute First Nat'l Bank, 436 N.E.2d 1160, 1162 (Ind. Ct. App. 1982).

We find unpersuasive Hilbert's arguments that SSD or Hamlin would bar the conclusion that as a matter of law, the Amended 1998 Plan and the Amended 1999 plan were the only two operative D&O plans. Further, as already noted, in the case at bar these plans contain no change of control provisions.[11] Therefore, there is no genuine issue of material fact as to the amount of Hilbert's liability on the Services Notes.[12]

2. Hilbert's Right to be Treated Like Other Employees

It is undisputed that on April 28, 2000, Hilbert left the employ of Conseco. The terms of the separation were clearly enumerated in the Termination Agreement between Hilbert and Conseco. Section 1 of the

Termination Agreement provided that Hilbert's employment was terminated effective April 28, 2000; Sections 2 and 3 provided for severance and bonus payments to Hilbert; Section 3 provided for Hilbert's resignation from all positions with Conseco; and Section 5 provided that

> the parties have contemporaneously entered into a Consulting Agreement providing, among other things, that [Hilbert] be available to perform specified services during a three year term.

(App. 453). Thereafter, Section 7 stated,

> With regard to stock purchases before the Termination Date made by [Hilbert] under the Director and Officer Stock Purchase Plans during the term of the Consulting Agreement [Conseco] will continue to treat [Hilbert] as though he were an employee/participant for purposes of [Conseco's] Director and Officer Stock Purchase Plans and [Conseco's] established practices and accommodations in therewith including waivers of any guarantee fees and advancement of any interest payments due.

Id.

The bankruptcy plan of September 9, 2003, as approved September 11, 2003, provided that Conseco would offer a stock purchase price adjustment agreement to participants in Conseco's D&O Plans who "purchased 40,000 or less shares." (App. 526). According to the Adjustment Agreement submitted with Hilbert's affidavit, these agreements were offered to eligible participants in the D&O Plans on September 12, 2003. Further, consistent with the bankruptcy plan, "any persons or entities that purchased more than 40,000 shares of Conseco, Inc. common stock and owe amounts" thereon under the D&O Plans, were ineligible for such adjustment agreements. (App. 1041). According to Hilbert, Adjustment Agreements participants were allowed to repay their debts for the stock they purchased under the D&O Plans for "pennies on the dollar," and pursuant to the Termination Agreement provision, the same offer should have been made to him.

The trial court concluded as follows:

> By its own terms, the Termination Agreement only required Conseco, Inc. to treat him as an employee during the term of his Consulting Agreement. Defendants do not dispute that the three-year term of the Consulting Agreement expired on April 28, 2003 -- three years after the Termination Agreement was signed. The Adjustment Agreement about which Hilbert complains was not offered to employees until after Conseco's Plan of Reorganization was confirmed on September 11, 2003, several months after Mr. Hilbert's consulting agreement had expired.

(App. 39).

Hilbert argues that despite the fact that the agreements were not offered to participants until September of 2003, the matter was discussed earlier.

However, he offers no authority for the proposition that "discussion" of an arrangement renders that arrangement an "established practice[]," which is the language of the provision. (App. 435).

To "establish" means to "settle, make, or fix firmly," to "enact permanently" or to "bring about or into existence." Black's at 468. Thus, the language of the provision expresses the requirement that as to Conseco practices that were settled, or set in place, until April 28, 2003 Hilbert would be treated the same as other participants in the D&O Plans. The Conseco practice that allowed adjustment arrangements to some participants was not settled or set in place until after Conseco's plan of reorganization was approved by the bankruptcy court, when those arrangements were offered to the participants. That date was September 9, 2003, which was several months after the three-year term of Hilbert's consulting agreement that is expressly referred to in the provision itself. Therefore, we must give effect to the term of the contract and reject Hilbert's argument. See *Stenger*, 819 N.E.2d at 480.

Hilbert further claims that his "employee-treatment rights should be extended as a result of" the nine-month long bankruptcy proceedings. (Hilbert's Br. at 42). Again, he offers no authority for this assertion. As Services correctly notes, courts have held that the Bankruptcy Code neither enlarges the rights of a debtor under a contract nor prevents the termination of a contract by its own terms. See *In re Advent Corp.*, 24 B.R. 612, 614 (B.A.P. 1st Cir. 1982); *In re Tut's Pyramid Inc.*, 178 B.R. 867, 871 (Bankr. M.D. Fla. 1995); *Advisory Information and Mgmt. Systems, Inc.*

v. Prime Computer, Inc., 40 B.R. 1001, 1006 (M.D. Tenn. 1984). Therefore, we find this argument unpersuasive.

By its own language, the provision that provided what Hilbert refers to as his "equal treatment rights" expired before Conseco allowed some participants in the D&O Plans to adjust their obligations thereon. Therefore, Hilbert's claim that there was a genuine issue of material fact "with respect to [his] 'employee treatment' issue" fails. Hilbert's Br. at 40.[13]

3. Application of Regulation U

"Regulation U" was issued by the Federal Reserve System pursuant to the Securities Exchange Act of 1934. 12 § C.F.R. 221.1(a). As cited by the trial court, Regulation U provides that no lender "shall extend any purpose credit, secured directly or indirectly by margin stock, in an amount that exceeds the maximum loan value of the collateral securing the credit." 12 C.F.R. § 221.3(a)(1). Further, "margin stock" is defined as "any equity security registered . .. on a national securities exchange," and "purpose credit" is defined as "any credit for the purpose, whether immediate, incidental, or ultimate, of buying or carrying margin stock." 12 C.F.R. § 221.2

The trial court found that Regulation U was

> inapplicable to the Services Notes because (a) those notes were not "purpose credit" extended for the purpose of "buying or carrying margin stock"; and (b) the Services Notes were not secured "directly or indirectly by margin stock."

> The Services Notes are not margin loans and are not secured by any margin stock. Thus, Regulation U has no application to the Services Notes.

(App. 35). The trial court further found that whether Hilbert could assert a "Regulation U defense" was "a question of law to be resolved by the court." (App. 35). It then concluded that Regulation U was not a defense available to Hilbert in the action brought by Services.

Hilbert does not directly challenge the trial court's finding that Regulation U does not apply to the Services Notes. In response to Services' observation of this fact, Hilbert responds that his argument as to a Regulation U defense suffices because if the bank loans "are void, no interest is owed on any" debt arising from the loans, citing *Thompson v. Gasparro*, 257 N.W. 2d 355, 356 (Minn. 1977)). Reply at 26. Specifically, Hilbert argues as follows: the participants' loans from the banks to purchase stock pursuant to the D&O Plans violated Regulation U; and a provision of the 1934 Securities Exchange Act states that a contract made in violation of a rule under the Act "shall be void," 15 U.S.C. § 78cc(b). As a result, Hilbert asserts, the banks' loans "were made in violation of Regulation U," and "are therefore void and unenforceable," which means that "no interest expense lawfully accrued on those loans"; hence, Services "was not required to pay any interest" to the banks on those loans. Hilbert's Br. at 49, 51. The trial court held that Hilbert lacked standing to cite Regulation U,[14] but Hilbert argues that despite authority in that regard, cases have held that "a borrower *can* assert a violation of Regulation U as a *defense to liability*." Hilbert's Br. at 50 (emphasis in original).

According to Hilbert, in *Transamerica Mortgage Advisors, Inc. (TAMA) v. Lewis*, 444 U.S. 11, 18-19, 100 S. Ct. 242, 62 L. Ed. 2d 146 (1979), the Supreme Court held that § 29(b) of the [1934 Act], 15 U.S.C. § 78cc(b), "confers a 'right to rescind' a contract void under the criteria of the statute." Hilbert's Br. at 50. However, we find that what TAMA states is that the Supreme Court had "previously recognized that § 29(b) of the [1934 Act], 15 U.S.C. § 78(cc)(b), confers a 'right to rescind' a contract void under the criteria of the statute," citing *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 388, 90 S. Ct. 616, 24 L. Ed. 2d 593 (1970). Further, the case it cited as having "previously recognized" this right, Mills, specifically cited § 29(b)'s statement that contracts made in violation of the Act or a rule thereunder were "'void . . . as regards the rights of' the violator," and held that "this language established that the guilty party is precluded from enforcing the contract against an unwilling innocent party." 396 U.S. 387.[15] Thus, the contract would be voidable at the option of the "unwilling innocent party." Id. Applying Mills to the facts here, it would seem to hold that if the banks violated Regulation U, the banks might not be able to enforce the Principal Notes against an unwilling innocent party. But this is not an action by the banks seeking to enforce those notes. This is an action by Services seeking to enforce the Services Notes and the Guarantees.

Hilbert also cites *Cohen v. Citibank*, N.A., 954 F. Supp. 621 (S.D.N.Y. 1996) to support his position that he can assert violation of Regulation U as a defense. Hilbert does not explain how Cohen is helpful to him. Cohen does cite both TAMA and Mills. However, Cohen expressly notes Mills' holding that an "*innocent party*" has a right to rescind a contract "made void under the criteria of Section 29(b)," which right was "reinforced" by the opinion in TAMA. 954 F. Supp. at 626 (emphasis in original).

Even if we were to accept Hilbert's contention that TAMA, Mills, and Cohen allow him to raise a defense based on his contention that the loans violate Regulation U, we would not find that it requires us to reverse the trial court's order. The designated evidence establishes the undisputed fact that he was Chief Executive Officer and Chairman of the Board of Conseco at the time Conseco obtained the bank loans.[16] Thus, if it were now found that contrary to the opinion of the many experts consulted by Conseco and the banks at the time, the loans were in violation of Regulation U, there is no designated evidence that raises any inference that Hilbert was either an unwilling or an innocent party in the obtaining of the bank loans that he now argues violate Regulation U. Therefore, Hilbert's Regulation U defense argument fails.

The trial court did not err in granting Services' motion for partial summary judgment because the language of the pertinent agreements establish Hilbert's liability on the Services Notes and Guarantees and the inapplicability of the equal treatment provision. Further, Hilbert cannot assert a Regulation U defense. Therefore, the trial court's order is affirmed.[17]

MATHIAS, J., and RILEY, J., concur.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

n1 Additional defendant-appellants are Tomisue Hilbert; Thomas C. Hilbert; Christopher L. Myers; the Trust Created Under Article II of the Amended Hilbert Residence Trust Dated August 19, 1999, as Amended; the Trust Created Under Article III of the Amended Hilbert Residence Trust Agreement Dated August 19, 1999; the Tomisue Hilbert First Amended Trust Agreement Dated August 6, 2002; the Stephen C. Hilbert Second Amended Trust Agreement Dated August 6, 2002; and the Hilbert Foundation. The complaint indicates that these parties are named as defendants based upon possible interests in the real estate that is the subject of one count of the action.

n2 We heard oral argument on September 8, 2005, at Ball State University. We express our appreciation to the University for its gracious hospitality, and we commend counsel for their able presentations.

n3 According to Hilbert, by 1997, Conseco was "the largest publicly traded life insurance company in America with a capitalization of approximately $ 14,000,000,000" and "listed on the Standard & Poor's 500 Index." (App. 373).

n4 This 1999 Plan did not purport to "amend," "restate," "supersede," or "replace" the 1998 Plan.

n5 Evidence indicates that the Principal Notes with the banks were also refinanced in November of 2000. (App. 1555).

n6 The first payment, of $ 1 million, was due immediately, in April of 2001; the second payment, of $ 6 million, was due in April of 2002; the third payment, of $ 10 million, was due in April of 2003.

n7 Conseco filed for bankruptcy on December 17, 2002; a reorganization plan under Chapter 11 of the U.S. Bankruptcy Code was approved September 11, 2003.

n8 Hilbert does not challenge the trial court's conclusion that his claim of having been "fraudulently induced . . . to execute the Services Notes and related guarantees" failed. (App. 34).

n9 An eligible participant is defined as "a non-employee Director of the Company, an executive officer of the Company or a senior officer of the Company selected by the Directors." (App. 391). This eligibility definition is also found in the 1997 Plan. (App. 399).

n10 Also, pursuant to the Amended 1998 Plan, the change of control provision in the 1998 Plan no longer applied to any other "Director and/or executive officer of Conseco as of November 1, 1999." (App. 1830).

n11 Because there was no change of control provision in the operative D&O plans, we need not reach the parties' arguments as to whether there had been an actual change of control as defined in the plans.

n12 Hilbert also urges that because the trial court relied upon a "false" fact, its ruling on the change of control issue is suspect and "should be reversed." Hilbert's Br. at 27, 37. Specifically, Hilbert cites the trial court's statement that "all stock purchases" under both the 1998 Plan and the 1999 Plan were completed before the November 1999 amendments to the plans. It is true that only purchases under the 1998 Plan had been completed at this time, and that the designated evidence indicates that Hilbert made $ 20,901.034 in D&O Plan stock purchases subsequent to the November 2, 1999 amendments. However, we have found the express language of the D&O Plans to provide that after November 2, 1999, only the Amended 1998 Plan and Amended 1999 Plan were operative. Therefore, because the trial court's findings of fact are not binding upon us, this argument fails. See *Rice*, 670 N.E.2d at 1283.

n13 Because we find the plain language of the provision itself dispositive, we do not address Hilbert's argument that the trial court erred when the trial court found that Hilbert's "equal treatment" claim failed not only based on the agreement's "own terms" but also because Adjustment Agreements were made available to participants who purchased less than 40,000 shares of stock through the D&O Loan Program, without regard to whether they were current or former employees. Hilbert concedes that his affiliates purchased more than that amount. Thus, Mr. Hilbert was treated identically to employees who had purchased more than 40,000 shares of stock in the program -- he was excluded from the Adjustment Agreement. As a result, he was treated the same as all other employees.

(App. 39, 39-40).

n14 The trial court's order found that Hilbert lacked "standing to assert the defense of regulation U," stating as follows:

> Federal Circuit Courts of Appeal that have considered the question have unanimously held that 'borrowing investors' do not have a private right of action under Section 7 of the 1934 Securities Exchange Act (the Section pursuant to which Regulation 7 was promulgated). *Bassler v. Central Nat'l Bank in Chicago*, 715 F.2d 308, 310 (7th Cir. 1983). See also *Gilman v. Federal Deposit Ins. Corp.*, 660 F.2d 688, 692 (6th Cir. 1981) (holding that "borrowers" did not have a private action under Regulation U); *Bennett v. United States Trust Co. of N.Y.*, 770 F.2d 308, 313 (2nd Cir. 1985) (the Second Circuit "agreed with the unanimous view of the circuit courts that have subsequently considered the issue and held that there is no implied cause of action for violations of Section 7."); *Amanda Acquisition Corp. v. Universal Foods Corp.*, 708 F. Supp. 984, 993 (E.D. Wis. 1989) ("given the 'strict approach' to implying private rights of action required by Cort, and the Seventh Circuit's impliedly 'uninhibited' but vain search for intent in Bassler, I must conclude there is no private right of action under § 7.").

(App. 35).

n15 Neither TAMA nor Mills involved Regulation U.

n16 According to Hilbert's affidavit, funds for the participants' D&O Plan loans were "made available *to Conseco* by a syndicate of banks." (App. 374) (emphasis added).

n17 Services has filed a motion to strike the references in Hilbert's Reply to the ruling of the trial court in another case in another county. As these references are immaterial to the issues considered by the trial court in this case and to the issues before us, we grant Services' motion. See Ind. Appellate Rule 42.

Velvet handcuffs Norton, Leslie P Barron's; Jul 24,1995; 75, 30; AB/INFORM Global

The latest way to tie executives' interests to shareholders': make them buy huge amounts of company stock. By LESLIE P NORTON

ONE OF THE MOST NOTEworthy developments in the history of capitalism is the rise of the professional manager, the chief executive who is granted nearly exclusive control over a sprawling corporation despite the fact that he owns little of it, often less than 1%. Though now widely accepted, this practice remains very much an innovation of the 20th century, bolstered in recent decades by the prominence of the Harvard Business School and other such executive boot camps. The trend has also been helped along by the inheritors of America's commercial wealth, many of whom don't seem to cotton to the task of running a business that has been built by dad or granddad or great-granddad. And who can blame them for giving up the workaday grind to spend their time playing golf or contributing to charity or collecting art or traveling the world?

But for all its advantages, the era of the professional manager has had notable shortcomings: chiefly, the tendency of some chief executives to live like owners while still thinking like employees. The excesses peaked in the 1980s, of course, when many Fortune 500 chieftains enjoyed fat salaries, corporate jets and lavish lifestyles regardless of how their companies were performing in the stock market. Throughout the 1960s and 1970s, the concept of laying off droves of workers and cutting costs was pretty much viewed as an unpleasant notion, one that most CEOs could safely ignore.

That has obviously changed during the past decade, partly because of hostile takeover bids and the threat thereof. Indeed, the nation's junk-bond raiders proved only too willing to cut costs. It cannot be denied that many raiders of the 1980s thought like owners - greedy owners perhaps, but owners nonetheless.

Millions of layoffs later, Corporate America has slimmed down, and it is now better able to face foreign competition than at any time since the 1960s. But still, doubts linger about whether chief executives' interests have been appropriately aligned with those of shareholders, large and small.

The latest proposal aimed at remedying this situation has been quietly sweeping through the ranks of the largest U.S. companies for several years now, and it has gathered force in recent months. The general theme: Coerce top executives to hold huge amounts of company stock so that their personal fortunes are inextricably tied to those of shareholders. To repeat, these shares are not given to the top executives, they must be bought, albeit sometimes at a discount to market value.

"If I were starting a company today," declares Ford Motor Co. Chairman Alex Trotman, "I'd surely want this kind of program for everyone from the chairman to the guy who sweeps the floors. It's great for team spirit, and that's one of the most difficult challenges for companies today."

This year, Ford instituted guidelines requiring 41 top managers to hold as much as five times their salary in stock. And Ford isn't alone. The roster of companies with similar guidelines includes behemoths like American Express, Intel BankAmerica, Bell Atlantic, J.P. Morgan and scores of others. In fact, about 20% of U.S. companies with annual revenues greater than $1 billion now have guidelines that require hefty stock ownership by senior executives. And now company directors, responsible for representing shareholders' interests, are increasingly being paid in stock.

"Within five years," crows Ira Kay, a top executive-compensation consultant at Watson Wyatt Co., "50% of the thousand largest companies in America will have a program like this."

While the movement toward greater stock ownership by top executives would appear to be a step in the right direction, critics point out that heavy insider holdings are no guarantee that a stock will do well. Moreover, the forced buying binge is creating some unease in the executive ranks, where some folks resent being prodded to concentrate what they view as an excessive amount of their wealth in one place. Arnold Ross, a New York-based benefits consultant, recalls a confidential conversation with a vice president of a major oil company: "I asked him why he owned such a large block of his company's stock. He said, `The minute I sell some of it, I might as well put my resume out and change career paths.' He didn't think his career would grow if he didn't hold on to a lot of stock."

Programs that force top executives to buy shares also threaten a time-honored guide to stock-picking: tracking insider investments. "Classic insider buying is based on a personal investment motive," observes Bob Gabele, president of CDA/Investnet, a Fort Lauderdale, Fla., service that tracks insider buying and selling. "In this case, it's difficult to measure whether there's any potential influence or peer pressure involved. If there's corporate pressure to buy the stock, it should carry less weight."

A LOOK AT SOME BUYING PROGRAMS Under most of the new guidelines, a group of a company's senior executives are encouraged to own a certain multiple of their salaries in stock. In some cases, this can go as high as 10 times, though typically it ranges from one to five times, depending on the executive's seniority. The guidelines at some companies may affect as few as the top five executives of a company, and at others all insiders are included, defined by the Securities & Exchange Act as employees with access to privileged information.

At companies like J.C. Penney, the guidelines cover everyone from the company's chief executive, Jim Oesterreicher, who must hold shares equivalent to seven times his base salary, all the way down to store managers, who must own stock equal to 50% of base salary. Typically, the guidelines recommend that employees amass the required shares of stock within five years of the time the guidelines are adopted.

Value investors have been pressing top executives to own more shares for decades, on the theory that heavy executive profit-sharing and stock options. And as ownership puts a company's managers and its shareholders more clearly on the same team. Benjamin Graham, for example advocated paying food-performing managers well, using a combination of salary, profit sharing and stock options. And as early as 1959, former Du Pont President Crawford Greenewalt suggested executives own enough stock so that dividends received in retirement would equal their retirement pay.

Share ownership by top management waned somewhat in the 1970s, as the long, painful bear market sliced stock prices in half. Around the same time, companies began offering busy managers with little time to oversee their financial affairs a new perk called personal financial consulting. Advisers brought in under such programs told the executives what is by now common knowledge: Holding too much of your wealth in a single asset increases your portfolio's risk. Executives acted accordingly.

Stock options seemed like an easy solution to the problem of making managers more sensitive to the price of the stock. Unfortunately, shareholders found, most executives immediately sold 90% of the stock they acquired by exercising options.

Enter guidelines for stock ownership by corporate executives. The dean of the new "guidelines" school is Frederic Cook, a New York-based executive-compensation consultant. Writing in Compensation & Benefits Review in September 1990, Cook observed that executives are typically employees without significant prior wealth, and thus lack the perspective of owners. Stock ownership, he contended, could radically change managers' attitudes and enhance any decisions they made on behalf of a company.

Building on recommendations made by DuPont's Greenewalt three decades earlier, Cook recommended that CEOs of large public companies own an average of 15 times their salary in stock, "with high-risk, marketing-oriented industries having higher targets of up to 30 times salary, and lower-risk basic industries having lower targets, down to five times salary." The guidelines could be satisfied by both direct and indirect stock holdings, including options and ownership of restricted shares.

Such multiples would hit executives right where it mattered, Cook reasoned. "A change in market value during a single year of plus- or minus-10% equals a change in the executive's net worth of 150% of salary," he averred. "This should overwhelm the executive's interest in short-term bonuses and other emoluments of office, and cause him or her to manage the business from the perspective of a long-term investor."

Cook also suggested guidelines for other managers, including holdings equal to 12.5 times salary for a chief operating officer, 10 times for the second reporting level, 7.5 times for the third and five times for the fourth. "High-potential replacements for key top management positions could have a targeted ownership interest (including common stock, options and restricted shares) of 10-15 times salary regardless of reporting level, but with long vesting periods," he wrote.

Cook's ideas have gained scores of adherents and been backed by various respected studies showing a link between share ownership and stock-price performance. Watson Wyatt Co., for example, found that over the past five years, 52 out of 145 large U.S. companies whose managers had big stakes relative to their base salaries returned 11.4% a year on average, versus 7.3% for the companies whose managers had smaller stakes.

Making the parallel case for stock ownership by directors, Charles Elson, a law professor at Stetson University in St. Petersburg, Fla., found that companies with "apparently excessive" levels of executive compensation had outside directors with "insignificant" equity holdings. In contrast, businesses with lower levels of compensation had boards with "substantial" equity holdings.

A vocal supporter of executive stock ownership is shareholder activist Nell Minow, a principal of Washington, D.C. based Lens Inc., which has $12 million under management. "Directors and managers should think like shareholders, and I don't know any other way to make them do that," Minow says. Increasingly, Minow's views are shared by major institutions, who believe that guidelines not only enhance performance but, in an age where a long-term contract is defined as three years, imposes loyalty.

"By buying companies with economic incentives aligned with shareholders, we strongly believe we do better than if those incentives aren't in place," says Bill Nygren, director of research for Chicago based Harris Associates, which runs $6 billion including the top-performing Oakmark funds. The Oakmark portfolios have a value bent, meaning they buy beaten down companies that frequently require nimble executives to revive them. "It's really important to us to see that management is on the same side of the table."

BIG PROFITS AT SCOTT PAPER

Though Scott Paper has no formal guidelines per se, Chairman Al Dunlap encouraged senior employees to buy company stock by making it a condition of their receiving restricted shares, subject to certain performance goals. Says Dunlop, "How can executives who are paid very handsomely, who own only restricted stock or options that are so far in the money that when they exercise them they can't miss, think like a shareholder? Downside risk is minimal in Corporate America." Top Scott executives had about three times their salary in Scott stock, and many stand to gain 40% or more on their stakes, thanks in part to last week's $7 billion takeover offer from Kimberly Clark.

The heavy stock ownership helped Scott managers to concentrate on cutting costs and then on improving the product line. "Once we were comatose, buried in debt, on Credit Watch," recalls Dunlap. "Now we have new products, new joint ventures in China and Mexico, and a new state-of-the-art facility in Kentucky." And, apparently, a new parent.

Baxter International has one of the more radical stock-ownership programs. Baxter arranged bank loans for some 70 executives to buy company stock from treasury reserves, guaranteeing the loans in case of a manager's bankruptcy. The purchases amounted to multiples of six to 10 times the executives' annual salary.

A Baxter manager who sells the shares within three years is responsible for 100% of any loss in the stock's price, and entitled to only 50% of any gain. After three years, however, the executive is responsible for just 50% of any loss and can receive 100% of any gain. Sixty-three people agreed to participate in the program; the remaining seven, according to Baxter Chairman Vern Loucks, pleaded hardship and other reasons. The stock purchases came after the company's 1993 restructuring. Loucks hopes that eventually the company will encourage all employees to own stock, though he hastens to add that it won't be mandatory.

Loucks himself borrowed $9 million to purchase 350,000 Baxter shares. "Are you kidding? This is more than my net worth," he says. "The point is that if the company fails the bank will get everything I've got." So far, he's safe. Baxter stock has risen 75%, to 35, since the company underwent its radical restructuring in 1993, reorganizing its hospital-supply unit, cutting capital spending, selling operations and undergoing other restructuring measures.

The aggressive stock-purchase guidelines at Baxter are at least one reason that Dave King, a top-performing manager at Putnam Funds, cites for his recent purchase of the stock for two funds he oversees. "I just can't' say enough about the prospects for Baxter International," explains King. "The free cash generation has become tremendous, their share repurchase has gone ahead of schedule, their capital spending and research and development are focused on growthier lines of business. I really believe this combination of factors will lead to very consistent earnings surprises on the upside."

One of the most frequent criticisms of the more aggressive programs is that too much ownership can make managers risk averse. That's because they could conceivably be so busy protecting their holdings they fail to make the kinds of investments that could move the company in more profitable directions in the long run.

For companies that already have extensive stock ownership, the imposition of additional guidelines seems unnecessary at best. J.C. Penney, for example, instituted guidelines in 1994, but 96% of the people covered already met or exceeded the guidelines. In any case, 23% of its stock is owned by employees. "I would say that these guidelines probably haven't had a whole lot of effect on individual behavior," says Chief Executive Jim Oesterreicher, So why have them? "Simply, it's a message to our shareholders."

Although heavy stock purchases may be no problem for CEOs and well-paid executives, they can become a problem for lower-level managers. Some critics say the stock-purchase plans border on the coercive, and Robert Marcin, Ford's director of compensation, doesn't deny it. If executives fail to comply, Marcin says, "I suppose there'll be a little browbeating." Some possible solutions suggested by compensation consultants who construct such programs: paying reluctant executives their bonuses in stock instead of cash, or making their future stock-option grants smaller. Already, some companies, including Xerox, make compliance with their guidelines a condition of participating in other incentive programs.

Loucks of Baxter argues that failure to comply with the guidelines doesn't interfere with career prospects. "'We have several people who elected not to be in the program, who've still done very well with promotions," he says.

Employees may also be unhappy to learn that the rules might apply even after they leave the company. "If they leave, they operate on the plan just like the rest of us," Loucks says. "We've had a couple of people leave, they still own the stock and they're still bound by the rules."

One question that sends chills down executives' spines: What happens after a market decline? Obviously, many executives would be forced to buy more shares to build their stakes up to the minimum dollar amount specified in the guidelines, but it remains unclear how long the executives would have to purchase those additional shares. "If stocks slide, there's bad news, and then there's terrible news," chuckles Graef "Bud" Crystal, a University of California-Berkeley business professor and publisher of the Crystal Report on executive compensation. "The bad news is that the stock is down. The terrible news is that you have to buy more. I think a lot of these programs will die a quiet death if that happens."

After studying 400 large companies' stock performance and their executives' share ownership, Crystal sees little relationship between the two (see table on page 22). And it remains open to debate whether the stock-purchasing guidelines will deliver performance where huge salaries and incentives for tap managers have failed. But for companies' largest shareholders, an aggressive stock-purchase plan for executives is an experiment worth conducting. After all, it sure beats coming in off the golf course to run Grandpa's company.

Hilberts endow St. V's pediatric ER

Author(s): IBJ Staff Report

The pediatric emergency department at the new St. Vincent Children's Hospital will be named for former Conseco Chairman Steve Hilbert and his wife, Tomisue.

The couple's Hilbert Foundation donated $2.5 million to construction of the wing, which will be named the Hilbert Pediatric Emergency Department

St. Vincent Hospitals and Health Services is building a $24 million hospital devoted to children's services, including the pediatric emergency department, at its West 86th Street campus.

Ground for the hospital was broken in May.

The announcement of the Hilbert gift was made as the St. Vincent Foundation kicked off a capital campaign designed to raise $6 million toward construction of the hospital.

Mark Howell, president of Brightpoint Inc. and chairman of the capital fund drive, said the Hilbert donation was gratifying, but not surprising. " The generosity of the Hilberts is well-known, " he said.

Howell said the foundation has raised about $3 million so far. The public campaign, kicked off Oct. 19 at a blacktie dinner, will get the message out about the children's hospital and will seek other donors.

The Hilbert gift to St. Vincent is not the first one. The Hilberts also have made gifts to the hospital's heart program and St. Vincent neonatal and pediatric programs.

Steve Hilbert is a member of the St. Vincent Foundation board of directors and Tomisue Hilbert is a member of the foundation's Seton Society committee.

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Hilbert charity tapped out

Not-for-profit gave millions to community groups in 1990s Author(s): Greg Andrews

The value of the assets in Conseco Inc . founder Stephen Hilbert's private family foundation have fallen to almost nothing , blunting the philanthropic firepower of an executive who doled out tens of millions of dollars to community causes in the 1990s .

The Hilbert Foundation had assets totaling $30 .5 million just 4-112 years ago . But the not-for-profit invested almost exclusively in Conseco shares , which now are nearly worthless . As of the end of 2002 , the foundation held assets worth just $180 ,835 , an Internal Revenue Service filing shows .

The value of the foundation peaked at $40 million in April 1998 , immediately before Conseco's calamitous, $6 billion purchase of the Minnesota-based mobile-home lender Green Tree Financial Corp .

The year before , Hilbert had placed 38th on Fortune magazine's list of top philanthropists . Soon thereafter, the National Society of Fundraising Executives honored Hilbert and his wife , Tomisue , as outstanding philanthropists .

The recognition came amid a torrent of gift giving . In 1996 , the Hilberts pledged $10 million to the Indianapolis Symphony Orchestra . The money went toward maintaining the ISO's landmark concert hall , rechristened the Hilbert Circle Theatre , and toward buying and renovating an adjacent downtown office building for musicians and staff .

The following year, the couple pledged $3 million toward development of the Indianapolis Zoo's White River Gardens.

"In both cases , I don't think you could have seen those projects completed at the time they were and in the fashion they were without the impact of their gifts ," said community leader Mike Alley , who was serving on both the symphony and zoo boards at the time .

Between contributions from the foundation and personal donations , "Tomisue and I are very proud that we have been able to contribute close to $30 million to many wonderful organizations ," Hilbert said in an e-mail response to IBJ questions late last week .

Hilbert, who resigned under pressure as chairman and CEO of the financial services company in April 2000 , now holds those posts at Haverstick Consulting , a business advisory firm headquartered in Carmel . "I ... have been working diligently to create additional resources for the Hilbert family ," he said in his e-mail .

He noted that Conseco stock traded for as much as $20 a share in May 2001 , more than a year after his departure. "Tomisue and I believe that what has happened to Conseco since May of 2001 is a true tragedy and , eventually , that story will be told ," the e-mail said .

Among the many beneficiaries of the Hilberts' largess over the past decade were Park Tudor School in Indianapolis, St. Christopher's Episcopal Church in Carmel and St. Vincent Hospitals and Health Services in Indianapolis .

Among the St. Vincent gifts: a $2 .5 million pledge announced in 2001 for the Hilbert Pediatric Emergency Department of the new St. Vincent Children's Hospital pledge, despite the decline in the value or his foundation .

"He was not specific beyond saying the commitment would be met," spokesman Ernie Reno said , relaying their conversation .

Hilbert, 57 , has other daunting obligations . He was the largest borrower in the mid- and late 1990s under a program that used loans to buy company stock . Hilbert now owes more than $200 million under the program , according to papers filed in Conseco's Chapter 11 bankruptcy case in Chicago .

An attorney for Hilbert has declined to say whether Hilbert believes he ought to have to repay . Other big borrowers have raised a range of defenses in court papers in their attempts to avoid repaying the loans , including that the program violated federal lending laws and that company bylaws indemnified them from losses .

The unflinching confidence in Conseco that apparently drove Hilbert to borrow so heavily carried over to his foundation . Conseco stock accounted for 96 percent of the foundation's $30 .5 million in assets as of the end of 1998, IRS records show.

Making matters worse, the records show, the foundation had been fulfilling many of its gifts by borrowing on margin, rather than by using cash or selling the underlying shares .

Because of the continuing slide in the stock price , the foundation had to liquidate a huge slug of shares when it paid off an $8 .3 million McDonald Investments margin loan in 2000 , IRS records show.

Foundations operated by other former Conseco executives also have suffered from having substantial Conseco holdings .

Former Executive Vice President Donald Gongaware's Donald and Patricia Gongaware Foundation saw its assets fall from $3 .1 million at the end 1997 to $272 ,510 at the end of 2001 , the most recent year for which IRS records were available.

Former Chief Financial Officer Rollin Dick's Helping Fund had greater diversification among its stock holdings , but still fell from $33 million at the end of 1997 to $7 .7 million in 2001, the most recent year available . That year, the Helping Fund gave out grants and gifts totaling $1 million .

Community leaders say they regret the loss of philanthropic firepower related to Conseco . For most of the 1990s , Conseco was one of the top-performing stocks in the nation. If that run of success had continued, the executives probably would have bestowed many more millions on their favorite local causes .

But they also note other major local benefactors remain, such as former Resort Condominiums International Chairwoman Christel DeHaan , and other executives who previously weren't known for their philanthropy have emerged as major players .

A case in point: Bill Bindley, who sold his publicly traded drug-wholesale business, Bindley Western Industries Inc. , to Ohio-based Cardinal Health Inc. for $2.1 billion two years ago . Last fall , Bindley announced a $52 .5 million gift to Purdue University, his alma mater. It was the largest gift to Purdue from an individual in the university's history .

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CONSECO, INC. DIRECTOR, EXECUTIVE AND SENIOR OFFICER STOCK PURCHASE PLAN

1. PURPOSE. The Director, Executive and Senior Officer Stock Purchase Plan (the "Plan'), of Conseco, Inc. ("Conseco"), is adopted to facilitate the purchase, by the Directors, executives and senior managers of Conseco and its subsidiaries (collectively, the "Company"), of Conseco's common stock ("Common Stock'") and Conseco's Preferred Redeemable Increased Dividend Equity Securities, 7% PRIDES, Convertible Preferred Stock ("PRIDES"). The purchases facilitated by the Plan are intended to achieve the following specific purposes:

a) more closely align key employees' financial rewards with the financial rewards realized by all other shareholders of the Company;

b) increase key employees' motivation to manage the Company as owners; and

c) increase the ownership of Common Stock and PRIDES among senior management of the Company.

2. ELIGIBILITY. To be eligible to participate in the Plan, the individual must be a not-employee Director of the Company, an executive officer of the Company or a senior officer of the Company selected by the Directors ("Eligible Participant")

3. PARTICIPATION. To become a Plan participant ("Participant"), an Eligible Participant must satisfy the following requirements:

a) submit a completed, signed and irrevocable election to purchase all or, in the case of Directors and Executive Officers, a portion of the Common Stock or PRIDES which the Eligible Participant is eligible to purchase under the Plan along with a power of attorney authorizing such purchases on the Participant's behalf;

b) complete and sign all necessary agreements and other documents relating to the loan described in Section 4 hereof including, but not limited to, personal financial statements, letters of instruction to brokers, transfer agents and banks as are necessary or appropriate under the loan described in Section 4 hereof, and a power of attorney authorizing borrowings under such loan; and

c) satisfy all other conditions of participation specified in the Plan.

The agreements and other documents specified in subsections 3 (a), (b) and (c) must be submitted at such times and to such Company offices as specified by the Company. No Eligible Participant is required to participate in the Plan.

Directors and executive officers may purchase up to 200,000 shares of Common Stock under the Plan. Senior officers electing to become Participants must purchase 10,000 shares of Common Stock. Up to 2,000,000 shares of Common Stock may be purchased by all Participants. Participants may elect that the number of shares of Common Stock they are eligible to purchase be reduced by up to 50% and that the same number of shares of PRIDES divided by two be purchased under the Plan. Directors and executive officers shall have the right to purchase share's not purchased by other Participants in such amount as is determined by the pro rata amount of their participation in the Plan compared to the participation of the other Participants electing to purchase additional shares. All such purchases may be made by the individual Participant or by a trust, corporation, partnership or limited liability company controlled by the Participant . ("Participant Designee"; the term Participant shall include Participant Designee unless the context otherwise requires)".

4. PURCHASE OF SHARES. Conseco, in its sole discretion subject to the terms and provisions of the Plan, will determine the timing, amount, price and mechanics of all of the purchases of shares of Common Stock and PRIDES (the "Purchased Shares") through open market and negotiated transactions. Purchases of Purchased Shares shall be effected through a broker in accordance with Rule 10b-18 under the Securities Exchange Act of 1934. The shares of Common Stock purchased pursuant to the Plan will be allocated proportionately among Participants at the end of each trading day based upon the percentage of all of the shares of Common Stock Participants have elected to purchase and the average price for all purchases of shares of Common Stock on that day. The shares of PRIDES Participants have elected to purchase will be allocated proportionately among Participants at the end of each trading day based upon the percentage of all of the shares of PRIDES Participants have elected to purchase and the average price for all purchases of shares of PRIDES on that day.

Conseco has arranged the opportunity for each Participant to obtain a loan through Bank of America

National Trust and Savings Association ("Bank") to fund the purchase of the Purchased Shares' (the "Loan") Each Participant must sign a power of attorney authorizing loans under the Credit Agreement with the Bank and the purchase of the Purchased Shares. Each Participant is responsible for satisfying all of the lending requirements specified by the Bank to qualify for the Loan including all collateral requirements. Each Participant is fully obligated to repay to the Bank all principal, interest, and any prepayment fees on the Loan when due and payable.

In the event a Participant does not wish to obtain the Loan, the Participant shall provide sufficient funds to fund the purchase of the Purchased Shares. Such Participant must execute a power of attorney authorizing the purchase of the Purchased Shares. If the Participant fails to fund the purchase of the Purchased Shares, the Participant may no longer participate in the Plan, and all of the Purchased Shares not paid for will be allocated to the other Participants.

5. REGISTRATION OF SHARES. The Purchased Shares will be registered in the name of the Participant or his or her designee and certificated. Each certificate will bear a legend referring to the: Plan. The ertificates for the Purchased Shares of each Participant who participates in the Loan will be held by the Bank as collateral for the Loan. Each such Participant must deliver to the Bank a stock power endorsed in blank with respect to the Purchased Shares. A Participant may be 'able to obtain a release of the Purchased Shares from the Bank provided that other collateral of equal value is substituted as collateral for the Loan.

6. SHAREHOLDER RIGHTS. Each Participant will have all of the rights of a shareholder with respect to the Purchased Shares, including the right to vote the shares and the right to receive dividends. Any dividends in excess of required interest payments will be deposited to the Participant's account at the Bank.

7. SALE OF PURCHASED SHARES. Each Participant is permitted to sell all or any, portion of the Purchased Shares;- provided, that any such sale does not violate any provision of a Loan.

8. DEATH OR DISABILITY; Upon the death of a Participant, her or his estate may elect to. cause Conseco, to pay the estate an amount equal to the purchase price paid for the Purchased Shares purchased by the deceased Participant minus the value of such shares on the date of the Participant's death based upon the average of the high and low trading prices per share for the Purchased Shares as reported by the principal national stock exchange upon which such shares are traded. The estate of a deceased Participant must make such election, in writing, within 30 days of the date of the Participant's death. Upon the total and permanent disability of a Participant who is an employee of the Company such disabled Participant may elect to cause Conseco, to pay the Participant an amount equal to the purchase price paid for the Purchased Shares by the disabled Participant minus the value of such shares on the date of the determination of the Participant's total and permanent disability based upon the average of the high and low trading prices per share for the Purchased Shares as reported by the principal national stock market upon which such shares are traded. The Participant must

make such election, in writing, within 30 days of the date of the determination of the Participant's total' and permanent disability. "Total and, permanent disability" means the inability of a Participant to provide meaningful service for the Company due to a medically determinable physical or mental impairment. Such determination of total and permanent disability shall be made by the Company. Notwithstanding the above, if a Participant qualifies for Federal Social Security disability benefits or for payments under the Company's long-term disability income plan, based upon his physical or mental condition, he shall be deemed to suffer from a total and permanent disability hereunder. This Section 8 has no effect on a deceased or disabled Participant's sale of Purchased Shares before the Participant's death or disability. Payment by Conseco of amounts described in this Section 8 is-conditioned on the payment in full of the Participant's Loan, if any, and the release of the Company's guarantee with respect thereto. This Section 8 will terminate 'January 1, 2002.

9. LOAN GUARANTEE. Conseco, will guarantee repayment to the Bank of 100% of all principal, interest, prepayment fees and other obligations of each Participant under such Participant's Loan described in Section 4. The Conseco loan guaranty is a condition to the loan arrangement Conseco has made with the Bank. The terms and conditions of the guarantee are as agreed by Conseco and the Bank. If a Participant specifies a Participant Designee, the Participant shall enter into an indemnification agreement to indemnify Conseco for any losses under the guaranty of the Loan with respect to the Participant Designee. Each Participant is fully obligated to repay to the Bank all

principal, interest, and other amounts on the Loan when due and payable. Conseco, may take any action relating to the Participant and her or his assets, which the Board of Directors deems reasonable and necessary, to obtain full reimbursement for amounts Conseco pays to the Bank under its guaranty related to the Participant's. or a Participant Designee's Loan- ("Loan Default"). Notwithstanding the foregoing, Conseco will not be subrogated to any right of the Bank as a holder of a security interest in the Purchased Shares.

10. CHANGES OF CONTROL. A "Change of Control" of Conseco shall mean a change of control of a nature that would be required to be reported in response to Item 6(e) of Schedule 14A of Regulation 14A promulgated under the Securities Exchange Act of 1934 the "1934 Act") as revised effective January 20, 1987, or if Item 6(e) is no longer in effect, any regulations issued by the Securities and Exchange Commission pursuant to the 1934 Act which serve similar purposes; provided, that, without limitations, (x) such a change of control shall be deemed to have occurred if and when either (A.) except as provided in (Y) below, any "person" (as such terms is used in Sections 13(d) and 14(d) of the 1934 Act) is or becomes a "'beneficial owner" (as such term is defined in Rule 13d-3 promulgated under the 1934 Act), directly or indirectly, of securities of Conseco representing 25% or more of the combined voting power of Conseco's then outstanding securities entitled to vote with respect to the election of its Board of Directors or (B) as the result of a tender offer, merger, consolidation, sale of assets, or contest for election of directors, or any combination of the foregoing transactions or events, individuals who

were members of the Board of Directors of Conseco immediately prior to any such transaction or event shall not constitute a majority of the Board of Directors following such transaction or event, and (y) no such change of control shall be deemed to have occurred if and when either (A) any such change is the result of a transaction which constitutes a "Rule 13e-3 transaction" as such term is defined in Rule 13e-3 promulgated under the 1934 Act or (B) any such person becomes, with the approval of the Board of Directors of Conseco, the beneficial owner of securities of Conseco representing 25% or more but less than 50% of the combined voting power of Conseco's then outstanding securities entitled to vote with respect to the election of its Board of Directors and in connection therewith represents, and at all times continues to represent, in a filing, as amended, with the Securities and Exchange Commission on Schedule 13D or Schedule 13G (or any successor Schedule thereto) that "such person has acquired such securities for investment and not with the purpose nor with the effect of changing or influencing the control of the Company, nor in connection with or as a participant in any transaction having such purpose or effect" or words of comparable meaning and import. The designation by any such person, with the approval of the Board of Directors of Conseco, of a single individual to serve as a member of, or observer at meetings of, Conseco's Board of Directors, shall not be considered "changing or influencing the control of the Company" within the meaning of the immediately preceding clause (B), so long as such individual does not constitute at any time more than one-third of the total number of directors serving on such Board. In the event of a Change of Control, each Participant will receive in exchange for the Purchased Shares the higher of (i) the purchase price paid for all of each Participant's Purchased Shares, respectively, plus all interest paid by each respective Participant under the Loan or (ii) the amount of the consideration to be paid for the. Purchased Shares in connection with the Change of Control. Such amount shall be paid to the Participants upon consummation of the event resulting in a Change of Control.

11. OTHER TERMINATION. If a Participant ceases to be a Director or officer of Conseco in circumstances other than as described in section 10, he or she may either (i) retire the Loan immediately and release Conseco's guaranty or (ii) continue the Loan until its maturity date with Conseco's guaranty.

If the Participant desires Conseco's guaranty to continue, he or she agrees that, as compensation for continuing such guaranty beyond the termination of such Participant's employment or directorship, as the case may be, the former Participant shall pay to Conseco the following fees:

(a) A continuing guaranty fee on the outstanding note balance at each calendar quarter end to be paid at the rate of .5% each quarter.

(b) A settlement fee equal to half of the "Exit Profit". The Exit Profit shall be the excess, if any, of (i) the proceeds received from the sale of the Related Shares (as defined herein) or the market value of the Related Shares on the date the guaranty is released, whichever occurs first minus (ii) the sum of (x) the market value of the Related Shares at the Participant's termination date and (y) the interest accrued on the Loan since the termination date for the Related Shares. The "Related shares" means the number of Purchased Shares acquired with the proceeds of the remaining principal amount of this loan at the date of termination of employment.

12. ADMINISTRATION. The Board of Directors of Conseco shall be charged with the administration and interpretation of the Plan but may delegate the ministerial duties hereunder to such persons as it determines. The Board of Directors of Conseco may adopt such rules as may be necessary or appropriate for the proper administration of the Plan. The decision of the Board of Directors of Conseco in all matters involving the interpretation and application of the Plan shall be final and shall be given the maximum possible deference allowed by law.

13. PAYMENT of EXPENSES. The expenses of administering the Plan shall be paid by the Company except those expenses which are expenses of the Participants.

4. EMPLOYER-EMPLOYEE RELATIONSHIP. The establishment of this Plan shall not be construed as conferring any legal or other rights upon any employee or any person for a continuation of employment, nor shall it interfere with the rights of the Company to discharge any employee or otherwise act with relation to the employee. The Company may take any action (including discharge) with respect to any employee or other person and may treat such person without regard to the effect which such action or treatment might have upon such person as a Participant of this Plan.

15. AMENDMENT AND TERMINATION. The Company reserves the right to change or discontinue this Plan by action of the Board of Directors in its discretion; provided, however, that in the case of, any person to whom benefits under this Plan had accrued upon termination of employment prior to such Board of Directors action, or in the case of any Participant who would have been entitled to benefits under this Plan had the Participant's employment ceased prior to such change or discontinuance, the benefits such person had accrued under this Plan prior to such change or discontinuance shall not be adversely affected thereby.

Notwithstanding anything herein to the contrary, nothing contained herein shall restrict the Company's right to terminate the Plan.

16. WITHHOLDING. The Company shall have the right to deduct in cash (whether under this Plan or otherwise) in connection with all payments by the Company to a Participant under this Plan any taxes required by law to be withheld and to require any payments required to enable it to satisfy its withholding obligations.

17. GOVERNING LAW. This Plan shall be construed in accordance with the laws of the state of Indiana.

Effective Date: April 4, 1996

Gary C. Wendt
Chairman of the Board CEO Conseco, Inc.

April 2, 2001

Stephen C. Hilbert
1143 West 116th Street
Carmel, IN 46032

RE: Work-Down Plan

Dear Steve:

This letter Sets forth the final proposal of the Special Committee of the Board of Directors of Conseco, Inc, with respect to your participation in the Conseco, Inc. 2000 NonEmployee Stock Purchase Program Work-Down Plan (the "Plan"). Capitalized terms used in this letter and not defined have the meaning given them in the Plan.

1. You shall grant as of the Effective Date (as hereinafter defined) a security interest to the Banks or the Company (as directed by the Committee) in collateral with a value of at least $19.4 million to secure your (including your Participant designees) Program Loans and Interest Loans. Such collateral must include a second mortgage on your one-half undivided interest in your beneficial interest in your residence located at 1143 West. 116th Street, Carmel, Indiana. Jay Alix & Associates will determine whether proposed collateral is acceptable and the value thereof . The collateral shall continue to secure your Program Loans and Interest Loans until all of your obligations associated therewith have been repaid in full. You may substitute collateral

with the prior written approval of the, Committee, which approval may not be unreasonably withheld

2. You shall make the following payments to the Banks which shall be applied to your Program Loans:

(i) $1 million on or before the Effective Date;
(ii) $6 million on or before one year from the Effective Date; and
(iii) $10 million on or before two, years from the effective Date. Payments shall be applied pro-rata among all of year participant designees' accounts.

3. Until such time as all amounts have been paid pursuant to Section 2 hereof, you agree that you will not exercise any Conseco, Inc. stock options other than in transactions in which you pay to the Banks all proceeds (net of exercise price and taxes) as principal payments on your Program Loans. Such amounts shall be credited against the payment requirements of Section 2.

4. The company agrees that if it negotiates an extension or renewal of the Program Loans for all participants in the Plan other than yourself and Mr. Dick, you will have an opportunity to participate in such extension or renewal on the same terms made available to other participants.

5. The Company shall cause Conseco Services, LLC to advance on your behalf all interest, fees and other charges accrued or accruing on your Program Loans and Interest Loans through December 31, 2003, and will not charge you any Guaranty Fee through

December 31, 2[illegible] so long as you comply with the terms of this letter and the Plan.

6. The Company shall cause Conseco Services, LLC not to renew the season tickets for the 2001-2002 Pacers basketball season at Conseco Fieldhouse for the seats located in Section. 16, Row 1, seat number 16, 17, 18, and 19 (the "Conseco Front Row Seats). In addition, the Company. shall use its reasonable efforts to allow some other party designated by you to buy the tickets for the Conseco Front Row Seats for the 2001-2002 Pacers basketball season and to allow you to buy the other party's front row seats. You agree not to occupy or to use any of the Conseco Front Row Seats purchased by the other party.

7. You agree and acknowledge that this letter represents a modification of obligations under Section 7 of the plan and that you are eligible only to participate in the Plan and not the Conseco, Inc. Employee Stock Purchase program work Down Plan.

8. You personally or as trustee agree to execute and to obtain, where required, the signatures of other persons or entities on any documents reasonably required by the Committee to effectuate the terms of this letter, including but not limited to mortgages, security agreements and financing statements.

9. The Company agrees to extend the maturity of your $1.9 million promissory note from its current maturity date of April 28; 2002 to December 31, 2003 as long as you begin paying interest after April 28, 2002 at the minimum rate then necessary to avoid imputed interest

for federal income tax purposes and thereafter at the rate provided for in the Note.

10. You agree that the terms of this letter agreement are in full satisfaction of the claims that you have asserted that you are entitled to under the terms of Section 7 of the Termination Agreement, dated as of April 28, 2000, between the Company and you, to receive the same terms and benefits that, are offered to employee/participants, under the Stock Purchase Programs and that you release the Company and its directors, officers, employees and agents from any liability with respect to those claims.

11. This letter agreement shall be effective on the date that you and Jay Alix & Associates agree in writing on the Collateral pursuant to Section 2 (the "Effective Date"); provided however, this letter agreement shall terminate and be of no further effect if the Effective Date has not occurred prior to April 20, 2001.

If the terms of this letter agreement are acceptable; please sign and return the duplicate original of this letter no later than 12:00 noon tomorrow.

PROMISSORY NOTE

Dated: November 22, 2000
$18,700,000
Carmel, Indiana

For value received, the undersigned, Thomas C. Hilbert Irrevocable Trust ("Maker") promises to pay to the order of Conseco Services, L.L.C., an Indiana limited liability company the "Company") or its assigns the "Holder"), at such place as the Holder may from time to- time designate in writing, in lawful money of the United States which shall be legal tender in payment of all debts and dues public and private at the time of payment, the principal sum of (a) $ 18,700,000 or, (b) if less, the sum of (i) the unpaid balance as of the date hereof of the replaced Promissory Note(s)(as hereinafter defined) made by Maker to Holder, (ii) the aggregate unpaid principal amount of all advances made from and after the date hereof by Company, (or Conseco, Inc, or any of its Affiliates) to or on behalf of Maker to pay interest, fees, and expenses under the Credit Agreement(s) (as hereinafter defined), (iii) the amount- of an origination fee paid by Conseco, Inc. on behalf of Maker equaling 1% of Maker's Existing Program Loans paid to one or more of the Banks as of September 22, 2000, and (iv) an amount equal to 1.625% per annum accrued from September 22, 2000 through the date of this Note on the amount of Maker's Existing Program Loans that were scheduled to mature August 26, 2001. Maker also promises to pay interest on the unpaid principal balance of this Promissory Note the "Note") at the rate and times hereinafter provided.

Maker has delivered this Note to Company in accordance with the "Conseco, Inc. 2000 Non Employee

Stock Purchase Program Work-Down Plan (the "Work-Down Plan"). Unless otherwise defined herein, capitalized terms defined in the Work-Down Plan and used herein shall have the meanings given to them in the Work-Down Plan.

Interest on the principal balance hereof from time to time remaining unpaid prior to maturity shall accrue at the variable rate per annum equal to the non-default interest rate applicable to the Maker from time to time pursuant to the Bank of America Credit Agreement (as hereinafter defined) and if the Bank of America Credit Agreement is no longer in existence, the last rate paid by Maker thereunder (the "Bank Rate"). However, after the Maturity Date (as hereinafter defined) or while there exists an Event of Default (as hereinafter defined), interest shall accrue at the Bank rate plus three percent (3%) per annum.

All unpaid principal and interest shall be due and payable on February 28, 2001 (the “Maturity Date”) with respect to any loan made to Maker under nay of the following (collectively, the “Credit Agreements”):

1. The Credit Agreement, dated as of November 22, 2000, among the Maker, the other persons listed on the signature pages thereto, the financial institutions party thereto and Bank of America, N.A., as Administrative Agent, as it may be amended, modified, supplemented, restated, refinanced, refunded or reviewed, in whole or in part, from time to time (the "Bank of America Credit Agreement").

Interest on the principal balance hereof shall be due and payable in arrears on the Maturity Date, or, if extended, on March 31, June 30, September 30 and December 31 of each year, beginning March 31, 2001, except as otherwise provided in the Work-Down Plan. Interest shall also be paid on the date of array prepayment of this Note for the portion of this Note so prepaid.

Maker may prepay this Note in full at any time or in part from time to time without premium or penalty. Notwithstanding any other provision, of this Note; pursuant to one or more subordination agreements executed by the Company and the lenders under the Credit Agreements (the "Banks") and Section 5(e) of the Work-Down Plan, if Maker tenders to Company any payment of interest or principal (a "Payment") hereunder at a time when any of Maker's Program Loans are still outstanding then the Company will deliver the amount of the payment to the Banks to be applied to the Program Loans designated by Maker at the time of such Payment or in the absence of such designation, pro rata to all Program Loans of the Maker. In such event the Payment will not reduce in any manner or serve as a credit against any of Maker's indebtedness to Company for principal or interest evidenced by this Note.

The occurrence of one or more of the following events shall constitute an event of default ("Event of Default") under this Note: (a) default is made in the payment of any installment hereof, either principal or interest, or in the payment of any other sum due hereunder, on the day when the same shall be due and payable hereunder and such default in payment continues for ten (10) days; (b) any proceeding shall be coerced or any petition shall be filed seeking relief with respect to Maker or the

Guarantor (as defined below) under any bankruptcy, insolvency or similar law; (c) a receiver, trustee, custodian, sequestrator or similar official shall be appointed with respect to maker or for a substantial part of its property; or (d) the death, the dissolution, or termination of existence, or business failure of Maker or the Guarantor. Upon the occurrence of an Event of Default hereunder, the Holder hereof may, at its option, declare the entire unpaid principal of and accrued interest on this Note immediately due and payable, without notice, demand or presentment, all of which are hereby waived. Upon the occurrence of an Event of Default under Section (b), (c) or (d) above, the entire unpaid principal of and accrued interest on this Note shall become immediately due and payable, without notice, demand or presentment, all of which are hereby waived. The Holder may offset against this Note any sum or sums owed by the Holder hereof to Maker.

Maker agrees to pay immediately upon demand all reasonable costs and expenses of the :Holder, including reasonable attorneys' fees, (i) if, after an Event of Default, this Note is placed in the hands of an attorney or attorneys for collection, or (ii) if the Holder attempts to have any stay or injunction prohibiting the enforcement or collection of the Note lifted by any bankruptcy or other court, and any subsequent proceedings or appeals from any order or judgment entered in any such proceeding.

The Maker, and any guarantors or endorsers of this Note jointly and severally waive presentment for payment, notice of protest, dishonor and demand, protest, and diligence in bringing suit. Payment of this Note is guaranteed pursuant to an Unconditional

Guarantee dated as of the date hereof by Stephen C. Hilbert ("Guarantor").

This Note supersedes and replaces all of the currently outstanding promissory notes by Maker favor of the Company executed in connection with Conseco Inc.'s stock purchase programs (collectively, the Replaced Notes). The Replaced Promissory Notes include, but are not limited to promissory notes dated as follows: June 28, 1996 and/or November 26,1996; and August 26, 1997.

This Note shall be construed according to and governed by the laws of the State of Indiana.

The following rights secured by statutes enacted and regulations promulgated by the United States are implicated in this case:

15 U.S.C. § 78cc:

> (a) Waiver provisions. Any condition, stipulation, or provision binding any person to waive compliance with any provision of this title or of any rule or regulation thereunder, or of any rule of an exchange required thereby shall be void.
>
> (b) Contract provisions in violation of title. Every contract made in violation of any provisions of this title or of any rule or regulation thereunder, and every contract (including any contract for listing a security on an exchange) heretofore or hereafter made, the performance of which involves the violation of, or the continuance of any relationship or practice in violation of, any provision of this title or any rule or regulation thereunder, shall be void (1) as regards the rights of any person who, in violation of any such provision, rule, or regulation, shall have made or engaged in the performance of any such contract, and (2) as regards the rights of any person who, not being a party to such contract, shall have acquired any right thereunder with actual knowledge of the facts by reason of which the making or performance of such contract was in violation of any such provision, rule or regulation: *Provided*, (A) That no contract shall be void by

reason of this subsection because of any violation of any rule or regulation prescribed pursuant to paragraph (3) of subsection (c) of section 15 of this title [15 USCS § 78o], and (B) that no contract shall be deemed to be void by reason of this subsection in any action maintained in reliance upon this subsection, by any person to or from whom any broker or dealer sells, or from or for whom any broker or dealer purchases, a security in violation of any rule or regulation prescribed pursuant to paragraph (1) or (2) of subsection (c) of section 15 of this title [15 USCS § 78o], unless such action is brought within one year after the discovery that such sale or purchase involves such violation and within three years after such violation. The Commission may, in a rule or regulation prescribed pursuant to such paragraph (2) of such section 15(c) [15 USCS § 78o(c)], designate such rule or regulation, or portion thereof, as a rule or regulation, or portion thereof, a contract in violation of which shall not be void by reason of this subsection.

(c) Validity of loans, extensions of credit, and creation of liens; actual knowledge of violation. Nothing in this title shall be construed (1) to affect the validity of any loan or extension of credit (or any extension or renewal thereof) made or of any lien created prior or subsequent to the enactment of this title enacted June 6, 1934, unless at the time of the making of such loan or extension of credit (or extension or renewal thereof) or the creating of such lien, the person making such loan or extension of credit (or extension or renewal thereof) or acquiring such lien shall have actual knowledge of facts by reason of which the making of such loan or extension of credit (or extension or renewal thereof) or the acquisition of such lien is a violation of the provisions of this title or any rule or regulation thereunder, or (2) to afford a defense to the collection of any debt or obligation or the enforcement of any lien by any person who shall have acquired such debt, obligation, or lien in good faith for value and without actual knowledge of the violation of any provision of this title or any rule or regulation thereunder affecting the legality of such debt, obligation, or lien.

78 U.S.C. § 78g

* * *

(d) Unlawful credit extension in violation of rules and regulations; exceptions to application of rules, etc.(1) Prohibition. It shall be unlawful for any person not subject to subsection (c) to extend or maintain credit or to arrange for the extension or maintenance of credit for the purpose of purchasing or carrying any security, in contravention of such rules and regulations as the Board shall prescribe to prevent the excessive use of credit for the purchasing or carrying of or trading in securities in circumvention of the other provisions of this section. Such rules and regulations may impose upon all loans made for the purpose of purchasing or carrying securities limitations similar to those imposed upon members, brokers, or dealers by subsection (c) and the rules and regulations thereunder.(2) Exceptions. This subsection and the rules and regulations issued under this subsection shall not apply to any credit extended, maintained, or arranged--(A) by a person not in the ordinary course of business;(B) on an exempted security;(C) to or for a member of a national securities exchange or a registered broker or dealer--(i) a substantial portion of whose business consists of transactions with persons other than brokers or dealers; or(ii) to finance its activities as a market maker or an underwriter;(D) by a bank on a security other than an equity security; or(E) as the Board shall, by such rules, regulations, or orders as it may deem necessary or appropriate in the public interest or for the protection of investors, exempt, either unconditionally or upon specified terms and conditions or for stated periods, from the operation of this subsection and the rules and regulations thereunder.(3) Board authority. The Board may impose such rules and regulations, in whole or in part, on any credit otherwise exempted by subparagraph (C) if it determines that such action is necessary or appropriate in the public interest or for the protection of investors.* * *

(f) Unlawful receipt of credit; exemptions.(1) It is unlawful for any United States person, or any foreign person controlled by a United States person or acting on behalf of or in conjunction with such person, to obtain, receive, or enjoy the beneficial use of a loan or other extension of credit from any lender (without regard to whether the lender's office or place of business is in a State or the transaction occurred in whole or in part within a State) for the purpose of (A) purchasing or carrying United States securities, or (B) purchasing or carrying within the United States of any other securities, if, under this section or rules and regulations prescribed thereunder, the loan or other credit transaction is prohibited or would be prohibited if it had been made or the transaction had otherwise occurred in a lender's office or other place of business in a State.(2) For the purposes of this subsection--(A) The term "United States person" includes a person which is organized or exists under the laws of any State or, in the case of a natural person, a citizen or resident of the United States; a domestic estate; or a trust in which one or more of the foregoing persons has a cumulative direct or indirect beneficial interest in excess of 50 per centum of the value of the trust.(B) The term "United States security" means a security (other than an exempted security) issued by a person incorporated under the laws of any State, or whose principal place of business is within a State.(C) The term "foreign person controlled by a United States person" includes any noncorporate entity in which United States persons directly or indirectly have more than a 50 per centum beneficial interest, and any corporation in which one or more United States persons, directly or indirectly, own stock possessing more than 50 per centum of the total combined voting power of all classes of stock entitled to vote, or more than 50 per centum of the total value of shares of all classes of stock.(3) The Board of Governors of the Federal Reserve System may, in its discretion and with due regard for the purposes of this section, by rule or regulation exempt any class of United States persons or foreign persons controlled by a United States person from the application of this subsection.* * *

12 C.F.R. § 221.3 (a):

No lender, except a plan-lender, as defined in §221.4(a), shall extend any purpose credit, secured directly or indirectly by margin stock, in an amount that exceeds the maximum loan value of the collateral securing the credit.

12 C.F.R. § 221.2

* * *

Purpose credit is any credit for the purpose, whether immediate, incidental, or ultimate, of buying or carrying margin stock.

* * *

12 C.F.R. § 221.7

The maximum loan value of any margin stock is fifty per cent of its current market value.

12 C.F.R. § 224.1:

(a) Authority and purpose. Regulation X (this part) is issued by the Board of Governors of the Federal Reserve System (the Board) under the Securities Exchange Act of 1934, as amended (the Act)(15 U.S.C. 78a et seq.). This part implements section 7(f) of the Act (15 U.S.C. 78g(f)), the purpose of which is to require that credit obtained within or outside the United States complies with the limitations of the Board's Margin Regulations T and U (12 CFR parts 220 and 221, respectively).(b) Scope and exemptions. The Act and this part apply the Board's margin regulations to United States persons and foreign persons controlled by or acting on behalf of or in conjunction with United States persons (hereinafter borrowers), who obtain credit outside the United States to purchase or carry United States securities, or within the United States to purchase or carry any securities (both types of credit are hereinafter referred to as purpose credit). The following borrowers are exempt from the Act and this part:

(1) Any borrower who obtains purpose credit within the United States, unless the borrower willfully causes the credit to be extended in contravention of Regulations T or U.

(2) Any borrower whose permanent residence is outside the United States and

who does not obtain or have outstanding, during any calendar year, a total of more than $ 100,000 in purpose credit obtained outside the United States; and(3) Any borrower who is exempt by Order upon terms and conditions set by the Board.